

## **Retail Payment System Act 2022**

### **Monitoring compliance with the initial pricing standard**

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## Contents

|   |           |
|---|-----------|
| <b>1. Overview of this paper .....</b>                          | <b>3</b>  |
| <b>Purpose of this paper .....</b>                              | <b>3</b>  |
| <b>Who will be interested in this paper .....</b>               | <b>3</b>  |
| <b>2. Context for this paper .....</b>                          | <b>4</b>  |
| <b>Retail Payment System Act 2022 .....</b>                     | <b>4</b>  |
| <b>Initial pricing standard .....</b>                           | <b>4</b>  |
| <b>Compliance and enforcement functions .....</b>               | <b>4</b>  |
| <b>3. Monitoring compliance with the IPS .....</b>              | <b>5</b>  |
| <b>Engagement with participants .....</b>                       | <b>5</b>  |
| <b>Publicly available information .....</b>                     | <b>5</b>  |
| <b>Information from participants to assess compliance .....</b> | <b>5</b>  |
| <b>Information on potential non-compliance .....</b>            | <b>8</b>  |
| <b>Complaints .....</b>   | <b>8</b>  |
| <b>Self-reporting .....</b>                                     | <b>8</b>  |
| <b>Investigations and enforcement .....</b>                     | <b>9</b>  |
| <b>How we deal with information .....</b>                       | <b>10</b> |

# 1. Overview of this paper

## Purpose of this paper

- 1.1 This paper describes the information we currently consider relevant to assessing whether the initial pricing standard (the **IPS** or the **standard**) in Schedule 1 of the Retail Payment System Act 2022 (the **Act**) is being complied with and explains the Commission's intended approach to monitoring compliance with the IPS.
- 1.2 On 7 September 2022 we published our draft guidance on the IPS (**draft Guidance**).<sup>1</sup> On 15 December 2022 we published our final guidance on the IPS (**Guidance**), which explains the scope and applicability of the IPS and how we interpret certain key provisions of the IPS.<sup>2</sup>
- 1.3 The draft Guidance included a chapter setting out the information required to assess compliance (being **Chapter 7**), which was removed from the Guidance. Instead, the content of Chapter 7 is reflected in this paper.
- 1.4 This paper has been prepared following consultation on the draft Guidance. Submissions received on the draft Guidance are available on our website.<sup>3</sup>
- 1.5 We are not seeking submissions on this paper. We have responded to points raised in submissions on Chapter 7 of the draft Guidance in the 'Response to submissions on Chapter 7 of the draft Guidance for the initial pricing standard' paper which is published alongside this paper. We expect that our responses will assist stakeholders in understanding the Commission's position on certain topics.
- 1.6 This paper may be revised from time to time to reflect changes in best practice, the law, the standard itself or our developing experience in monitoring, investigating, and enforcing compliance with the IPS.
- 1.7 All abbreviations and terms used in this document are either defined or have the same meaning as in the Guidance.

## Who will be interested in this paper

- 1.8 This paper will be of interest to the participants of the Mastercard and Visa credit and debit networks (**designated networks**), in particular the network operators, issuers, acquirers and switches of those networks.
- 1.9 Ultimately, participants remain responsible for ensuring they comply with the IPS. As set out in the Guidance, we expect all participants who have a role in the setting, processing and charging of interchange fees to take steps to familiarise themselves with the requirements of the IPS.
- 1.10 We recommend that you seek legal advice if you are unsure of your obligations.

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<sup>1</sup> [Commerce Commission "Retail Payment System Act 2022 - Draft guidance on the initial pricing standard" \(7 September 2022\).](#)

<sup>2</sup> [Commerce Commission "Retail Payment System Act 2022 – Guidance on the initial pricing standard" \(15 December 2022\).](#)

<sup>3</sup> [https://comcom.govt.nz/regulated-industries/retail-payment-system/ nocache.](https://comcom.govt.nz/regulated-industries/retail-payment-system/)

## 2. Context for this paper

### Retail Payment System Act 2022

- 2.1 The Act received Royal assent on 13 May 2022 and introduced a new regulatory regime for the retail payment system with effect from 14 May 2022.<sup>4</sup>
- 2.2 The purpose of the Act is to promote competition and efficiency in the retail payment system for the long-term benefit of New Zealand merchants and consumers.<sup>5</sup> The Commission must exercise its functions and powers for this purpose. In addition, the Commission must consider the following principles to the extent they are relevant:<sup>6</sup>
- 2.2.1 that merchants and consumers should pay no more than reasonable fees for the supply of payment services; and
  - 2.2.2 that the retail payment system provides a reasonable degree of transparency.
- 2.3 The Commission's role is summarised on our website.<sup>7</sup>

### Initial pricing standard

- 2.4 The IPS set out in Schedule 1 of the Act came into force on 13 November 2022. The IPS regulates the level of interchange fees on the designated networks.
- 2.5 An interchange fee is a fee paid by the acquirer to the issuer for the transaction. These fees only apply to certain transactions – such as credit card transactions, and contactless, card-not-present (eg, online) and international scheme debit transactions.
- 2.6 Interchange fees are generally the largest component of merchant service fees, which are charged by acquirers to merchants for processing certain payments.
- 2.7 Refer to the Guidance for information on the retail payment system and the IPS, including the key participants within the designated networks and key concepts (such as interchange fees).

### Compliance and enforcement functions

- 2.8 The Commission is responsible for enforcing the obligations arising under or in connection with the Act.
- 2.9 Potential remedies the Commission may seek in cases of non-compliance with a network standard vary depending on the nature of the non-compliance. These include pecuniary penalties, injunctions restraining conduct or requiring action to be taken, and compensation orders.<sup>8</sup>

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<sup>4</sup> Retail Payment System Act 2022, s 2.

<sup>5</sup> Retail Payment System Act 2022, s 3.

<sup>6</sup> Retail Payment System Act 2022, s 4.

<sup>7</sup> <https://comcom.govt.nz/regulated-industries/retail-payment-system/> nocache.

<sup>8</sup> Retail Payment System Act 2022, ss 39, 45 and 47.

### 3. Monitoring compliance with the IPS

- 3.1 We will monitor compliance with the obligations under the IPS in a number of ways, including by:
- 3.1.1 engaging with participants;
  - 3.1.2 utilising publicly available information;
  - 3.1.3 seeking information from participants; and
  - 3.1.4 considering complaints and self-reports received in relation to compliance with the IPS.
- 3.2 Please refer to the Guidance for information on the obligations under the IPS.<sup>9</sup>

#### Engagement with participants

- 3.3 We intend to engage with participants to understand the processes participants have in place to ensure compliance with the IPS. For example, we may request ‘walk-throughs’ where a participant explains or shows us its compliance systems and processes.
- 3.4 We also encourage participants to discuss any issues they encounter with us by emailing [retailpaymentsystem@comcom.govt.nz](mailto:retailpaymentsystem@comcom.govt.nz).

#### Publicly available information

- 3.5 In addition to seeking information from participants (as set out below), we will also utilise publicly available information to monitor compliance with the IPS.
- 3.6 For example:
- 3.6.1 the publicly available schedules of maximum interchange fees published by the schemes and issuers will be relevant to monitoring compliance with the interchange fee component of the fee cap.
  - 3.6.2 for the net compensation component of the fee cap, publicly available information on merchant service fee levels may provide an indication of where acquirer costs have increased.<sup>10</sup>

#### Information from participants to assess compliance

- 3.7 We will seek a range of information from participants to enable us to monitor compliance with the obligations under the IPS.

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<sup>9</sup> See Chapters 5 and 6 of the Guidance. Note that non-compliance with IPS may occur in ways not covered by the scenarios set out in Chapter 5 (which are intended to be illustrative examples only).

<sup>10</sup> As set out in the Guidance, in considering whether compensation has been made for the purpose of compensating an issuer for the effect the IPS, we will take into account (among other things) whether that compensation is directly or indirectly funded by adding or increasing costs to acquirers (and indirectly to merchants).

- 3.8 This information includes:
- 3.8.1 interchange fee information – ie, information to enable us to determine the level of interchange fees being charged; and
  - 3.8.2 net compensation information – ie, information to enable us to determine whether there has been the provision of any net compensation.
- 3.9 This reflects that the ‘total interchange fee’ for a transaction, which is assessed against the fee caps, is the sum of (a) the interchange fee; and (b) any net compensation that can reasonably be attributed to a transaction.<sup>11</sup>
- 3.10 The combination of interchange fee information and net compensation information will assist us in determining whether the fee caps are likely being complied with.
- 3.11 Where appropriate, we may seek additional or alternative information from that set out in this paper. For the avoidance of doubt, that includes information from parties not mentioned below.

### **Interchange fee information**

- 3.12 We will seek the below information to enable us to calculate the average interchange fee charged for each interchange fee category.
- 3.13 Where any average is above the applicable fee cap, we may seek additional information (such as a breakdown of the interchange fee charged for each relevant transaction) in order to determine whether there has been non-compliance.
- 3.14 We will seek the following information from the schemes in respect of each issuer operating on its designated networks:
- 3.14.1 total value of interchange fees paid to the issuer in respect of debit network transactions, broken down by interchange fee category;
  - 3.14.2 total number of debit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category;
  - 3.14.3 total value of debit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category;
  - 3.14.4 total value of interchange fees paid to the issuer in respect of credit network transactions, broken down by interchange fee category;
  - 3.14.5 total number of credit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category; and
  - 3.14.6 total value of credit network transactions for which interchange fees were paid to the issuer, broken down by interchange fee category.
- 3.15 We will first seek this information for the six months following the IPS coming into force (the period 13 November 2022 to 12 May 2023), and thereafter on an annual basis.

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<sup>11</sup> Retail Payment System Act 2022, cl 7(4) of Schedule 1.

### **Net compensation information**

- 3.16 To understand whether any net compensation has been provided to an issuer, we need to understand the compensatory arrangements in place prior to 13 May 2022 when the Act received Royal assent.
- 3.17 This will enable us to establish a ‘baseline’, which we can assess the ongoing compensatory arrangements against to determine whether there are any changes in those arrangements.
- 3.18 We anticipate initially focussing on the compensatory arrangements of larger issuers, but that does not prevent us from seeking this information in respect of any other issuer on the initial designated networks.

### **Pre-Act compensation information**

- 3.19 This information will enable us to determine the ‘baseline’ compensatory arrangements, against which we can establish whether any compensatory arrangements change or increase after 13 May 2022.<sup>12</sup>
- 3.20 To determine those ‘baselines’ we will seek from the schemes:
- 3.20.1 the total value of compensation (both monetary and non-monetary) provided to the issuer by the scheme for each of the three years prior to 13 May 2022; and
  - 3.20.2 the total value of payments made by the issuer to the scheme for each of the three years prior to 13 May 2022.
- 3.21 If required, we may also seek this information from issuers (for example, to verify the information provided).

### **Post-Act compensation information**

- 3.22 Visibility of compensatory arrangements between the schemes and issuers after 13 May 2022 is necessary to ascertain whether any compensation has occurred which may meet the definition of net compensation.
- 3.23 We will seek from the schemes on an annual basis:
- 3.23.1 the total value of compensation (both monetary and non-monetary) provided to the issuer by the scheme; and
  - 3.23.2 the total value of payments made by the issuer to the scheme.
- 3.24 We may also seek this information from issuers, if required (for example, to verify the information provided).
- 3.25 If the compensation position of an issuer increases from one year to the next, we may seek further information to determine the reason for that increase, including (but not limited to) a breakdown of the compensatory arrangements and an explanation for any increase in compensation.

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<sup>12</sup> The definition of net compensation requires the payment, incentive, etc., to be paid or provided after 13 May 2022. As set out in the Guidance, compensation agreed before 13 May 2022 may still be relevant for the purpose of calculating net compensation provided the provision/payment occurred after that date.

- 3.26 Where we consider that any compensation provided to an issuer likely meets the definition of net compensation, we may seek information to ascertain to which transactions that net compensation may be reasonably attributed to determine the ‘total interchange fee’ for each of those transactions.<sup>13</sup>

#### **How we will seek this information**

- 3.27 We may ask participants to supply us with information voluntarily, or we may issue a compulsory notice requiring the supply of information.<sup>14</sup>
- 3.28 You may wish to seek legal advice if you are asked or required to supply the Commission with information.

#### **Information on potential non-compliance**

- 3.29 We welcome information about potential non-compliance with the IPS, including complaints and self-reports.
- 3.30 If you have information on potential non-compliance with the IPS, please email [retailpaymentsystem@comcom.govt.nz](mailto:retailpaymentsystem@comcom.govt.nz).

#### **Complaints**

- 3.31 If any person has reason to believe the IPS has not been complied with, they may lodge a complaint with the Commission.
- 3.32 We recommend the complainant supply us with as much information as possible to enable us to understand the scope and nature of potential non-compliance.

#### **Self-reporting**

- 3.33 We encourage participants to self-report any potential non-compliance with the IPS.
- 3.34 A self-report will form part of our consideration of the appropriate enforcement response where applicable. Where we uncover non-compliance that was known, but not self-reported, this will also form part of our consideration of the appropriate enforcement response.
- 3.35 Making a self-report will not prevent us from taking any form of enforcement action that we consider appropriate (see below for information on our enforcement approach).

#### **Information to provide when self-reporting**

- 3.36 We recommend that participants supply us with as much information as possible to enable us to understand the scope and nature of potential non-compliance.

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<sup>13</sup> Total interchange fee is defined as “the sum of the interchange fee plus any net compensation that can reasonably be attributed to a transaction (for example, by dividing net compensation for a period by the number or value of relevant transactions during the same period).”

<sup>14</sup> Our powers to issue compulsory notices requiring the supply of information are contained in sections 36 (importing section 98 of the Commerce Act with all necessary modifications) and 37 of the Act.



- 3.37 When self-reporting potential non-compliance, we encourage participants to provide a clear written explanation of the issue, including:
- 3.37.1 what the issue is (including why the participant considers it is or may be non-compliant);
  - 3.37.2 how the issue occurred;
  - 3.37.3 how the issue was identified;
  - 3.37.4 who has been affected by the issue and to what extent;
  - 3.37.5 whether the issue has been remedied (and if so, how it has been remedied) or is intended to be remedied; and
  - 3.37.6 whether steps have been taken to stop the issue from reoccurring.
- 3.38 If the participant is unsure of the cause of the non-compliance, the participant should notify us of this.

### **How we deal with information on potential non-compliance**

- 3.39 We will conduct an initial screening of the issue, where we consider whether the matter warrants investigation.
- 3.40 Once we complete our initial screening, we will notify the party who provided the information of our decision and, depending on the outcome, any next steps. This may include:
- 3.40.1 taking no further action in relation to the matter;
  - 3.40.2 undertaking preliminary information gathering to better understand the facts or to test the information provided to us before determining whether to open an investigation; or
  - 3.40.3 opening an investigation into the matter.

### **Investigations and enforcement**

- 3.41 After the initial screening of any potential non-compliance, a matter may be investigated.
- 3.42 The following documents on our website are relevant to our approach to investigating and enforcing non-compliance:
- 3.42.1 Enforcement Criteria<sup>15</sup> – setting out the criteria we apply when making decisions on whether to open an investigation, and what enforcement action we will take at the end of an investigation; and
  - 3.42.2 Enforcement Response Guidelines<sup>16</sup> – outlining the way in which we exercise our enforcement discretion, including the factors we will take into account when deciding what enforcement response to use.

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<sup>15</sup> Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

<sup>16</sup> Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

- 3.42.3 Investigation Guidelines<sup>17</sup> – setting out how we undertake investigations and what parties can expect to happen during an investigation.

### **How we deal with information**

- 3.43 Our Transparency Statement sets out how we deal with information we collect.<sup>18</sup>
- 3.44 We are committed to handling information responsibly. This includes:
- 3.44.1 using information only as allowed by law; and
  - 3.44.2 taking steps to ensure that for private, confidential, or commercially sensitive information we provide appropriate protections against disclosure.
- 3.45 We understand that some of the information we may receive (whether provided voluntarily or compulsorily) is information that is not otherwise in the public domain. We are conscious of the need to ensure that parties can have confidence in our use and retention of information, including our commitment to respecting as far as possible any privacy, confidentiality, or commercial sensitivity attaching to the information.
- 3.46 We seek to balance parties' rights and expectations as to the confidentiality of information they supply to us against:
- 3.46.1 the need for us to effectively and efficiently undertake our role, including in conducting any investigations; and
  - 3.46.2 our legal obligations under the Official Information Act 1982 (**OIA**), and in particular, the principle of availability of information.

### **How we use information**

- 3.47 Any information we collect or receive for the purposes of monitoring compliance with the IPS will be used for that purpose.
- 3.48 The information may be used as the basis for analysis (including econometric or accounting analysis), which may be conducted by Commission staff, external contractors, or a combination of both. The Commission will enter into appropriate confidentiality arrangements with any such contractor.
- 3.49 The information may also:
- 3.49.1 be used for other purposes, such as for the purposes of undertaking an investigation and taking enforcement action.
  - 3.49.2 be shared within the Commission. For example, the information may disclose a new issue of which we were unaware (such as a Commerce Act issue) or may be relevant to an ongoing investigation.

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<sup>17</sup> Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/competition-and-consumer-investigation-guidelines>.

<sup>18</sup> Accessed at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/transparency-statement>.

## The Official Information Act 1982

- 3.50 The OIA provides the framework for the disclosure of information that we hold where we receive a request for information (**OIA request**). Under the OIA all information is to be made available unless good reasons exist to withhold it.<sup>19</sup> This is known as the principle of availability.
- 3.51 There are a number of reasons why the Commission may withhold information where it receives an OIA request. In some cases, the existence of particular facts is a conclusive reason to withhold the information. These include, most relevantly, where:
- 3.51.1 the release would be likely to prejudice our investigation;<sup>20</sup> or
  - 3.51.2 the release would be in contempt of court.<sup>21</sup>
- 3.52 In other cases, the Commission must balance the reason for withholding information against the public interest in disclosure. This includes, most relevantly, where:
- 3.52.1 the release would unreasonably prejudice the commercial position of the supplier or subject of the information;<sup>22</sup> or
  - 3.52.2 we received the information under an obligation of confidence, and if we were to make that information available it would:<sup>23</sup>
    - 3.52.2.1 prejudice the supply of similar information to us (by any person) where it is in the public interest that such information continues to be supplied to us; or
    - 3.52.2.2 be likely otherwise to damage the public interest.
- 3.53 As the principle of availability applies, the information may only be withheld if the potential harm from releasing it is greater than the public interest in disclosure. This ‘balancing exercise’ means that in some cases information can be released where there is some possible harmful effect that might appear to justify withholding it.
- 3.54 We do not need to receive an OIA request to disclose information. When performing our functions, we can proactively release information that in our assessment should be made disclosed because we consider the public interest in the disclosure outweighs the potential harm from releasing the information.

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<sup>19</sup> Official Information Act 1982, s 5.

<sup>20</sup> Official Information Act 1982, s 6(c).

<sup>21</sup> Commerce Act 1986, s 100 and Official Information Act 1982, s 18(c)(i).

<sup>22</sup> Official Information Act 1982, s 9(2)(b)(ii).

<sup>23</sup> Official Information Act 1982, s 9(2)(ba).

## Sharing information with other agencies

- 3.55 The Commerce Act permits us to provide information and documents that we hold in relation to the performance or exercise of our functions, powers or duties under the Act or any other legislation, to a public service agency,<sup>24</sup> a statutory entity,<sup>25</sup> the Reserve Bank of New Zealand, or the New Zealand Police (**relevant agency**).<sup>26</sup> However, we may only do so if:
- 3.55.1 we consider the information or document may assist the relevant agency in the performance or exercise of its functions, powers, or duties under any legislation;
  - 3.55.2 we are satisfied that providing the information or document will not substantially affect the performance of the Commission's other functions; and
  - 3.55.3 we are satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of any information or document provided (in particular, information that is personal information within the meaning of the Privacy Act 2020).
- 3.56 Examples of situations where we may share information include (but are not limited to):
- 3.56.1 where information we have obtained appears to raise concerns under a law that another enforcement agency enforces;
  - 3.56.2 where we plan to, or are in the course of, conducting an investigation in conjunction with another enforcement agency; or
  - 3.56.3 where information we have obtained suggests serious criminal offending in New Zealand that falls outside our responsibilities.
- 3.57 Before providing any relevant agency with confidential information, we will ensure that the relevant agency has provided appropriate assurances that it will:
- 3.57.1 keep the information confidential, and
  - 3.57.2 use it only for the purposes for which it is provided.

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<sup>24</sup> Listed in Section 10(a) of the Public Service Act 2020.

<sup>25</sup> Listed in Schedule 1 of the Crown Entities Act 2004.

<sup>26</sup> Commerce Act 1986, s 99AA(1) and (2).