



Legal Review of the Malawi National Fertilizer Policy, and Regulatory Options for the Fertilizer Bill and Draft Regulations

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FOR A GREEN REVOLUTION IN AFRICA (AGRA)**





Acronyms

AFAP	African Fertilizer and Agribusiness Partnership
AGRA	Alliance for a Green Revolution in Africa
AOAC	Association of Official Analytical Chemists
AU	African Union
CAADP	Comprehensive Africa Agriculture Development Program
COMESA	Common Market for Eastern and Southern Africa
DAR	Department of Agricultural Research
EAC	East African Community
ECOWAS	Economic Community of Western African States
FAM	Fertilizer Association of Malawi
FAO	Food and Agriculture Organization of the United Nations
IFA	International Fertilizer Association
IFDC	International Fertilizer Development Center
IPNM	Integrated Plant Nutrient Management
ISO	International Organization of Standardization
MBS	Malawi Bureau of Standards
NAP	National Agricultural Policy
NARS	National Agricultural Research Services
NFRC	National Fertilizer Regulatory Commission
NFS	National Fertilizer Strategy
NML	New Markets Lab
REC	Regional Economic Community
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SPS	Sanitary and Phytosanitary Measures
SSA	Sub-Saharan Africa
TBT	Technical Barriers to Trade
TFTA	Tripartite Free Trade Agreement
UN	United Nations



- USD** United States Dollar
- USAID** United States Agency for International Development
- WTO** World Trade Organization



Executive Summary

National fertilizer policies, laws, and regulations serve to promote agricultural productivity and food security through improved access, availability, and affordability of quality fertilizer. These instruments contribute to creating an enabling environment for growing and sustaining fertilizer markets, and tailored and streamlined rules can enable stakeholders to better address economic and social needs. National policies, laws, and regulations can also influence the cost of doing business and impact investment in the fertilizer sector.

Malawi's fertilizer sector has long been operating under an older law and regulations, the Farm Feeds and Remedies Act of 1970 and the Fertilizer Regulations (GN.142/1970 as amended by GN 64/1996) thereunder. This legal and regulatory framework is outdated and inadequate for addressing the issues that currently affect the country's fertilizer sector. The Farm, Feeds and Remedies Act and Fertilizer Regulations, for instance, lack provisions on fertilizer registration, adulterated and counterfeit fertilizer, fertilizer production, quality standards for organic and bio-fertilizer, appeals and confidentiality, and harmonization with regional rules, among others. This has had broader implications both for the development of Malawi's agricultural sector and for wider access to regional markets. To address these legal and regulatory gaps, the government of Malawi developed a National Fertilizer Strategy in 2012 that laid the foundation for the recently adopted National Fertilizer Policy (2021) and draft Fertilizer Bill and Regulations. Each of these instruments will play a different but interconnected role in creating an enabling environment for the fertilizer sector. The policy establishes a guiding framework of principles upon which the fertilizer law and regulations will be based. A Fertilizer Act, once passed into law, will create legally binding provisions to govern the fertilizer sector, and regulations will further build the system through procedural rules and more detailed processes related to implementation of the law. Each of these instruments in the legal, regulatory, and policy framework can be complex, and they merit assessment, individually and in combination, to evaluate their alignment with regulatory good practices and Malawi's priorities.

International and regional fertilizer regulatory instruments provide a guiding (and in some cases binding) framework for national level law and regulation. At the international level, the World Trade Organization (WTO), of which Malawi is a member, establishes a framework for obligations related to fertilizer measures, both under the 1995 WTO Technical Barriers to Trade (TBT) Agreement, which governs technical regulations and standards, and the WTO Sanitary and Phytosanitary (SPS) Agreement, which governs measures related to human, animal, or plant life or health. These two instruments establish rules and principles for WTO Member States that will impact issues such as fertilizer standards and labeling (TBT Agreement) and regulations on permitted fertilizer residue in food (SPS Agreement). Regional Trade Agreements (RTAs), including the African Regional Economic Communities (RECs) and African Continental Free Trade Area (AfCFTA) also often incorporate the principles of the SPS and TBT Agreements,



including the obligation to maintain science-based measures, preference for international harmonization, and encouragement to align with international standards where they exist.

In addition to these instruments, the Food and Agriculture Organization of the United Nations (FAO) developed the 2019 International Code of Conduct for the Sustainable Use and Management of Fertilizers, which is a soft law instrument that guides countries in the regulation of fertilizer to enable its sustainable and responsible use and management for agriculture and other plant production purposes in order to avoid negative impacts on human, animal, and soil health and the environment. The Code, among other things, calls for countries to implement a fertilizer policy, quality control mechanism, registration system, where appropriate, penalties for non-compliance, and regulation of the composition and quality of fertilizers. The Code also covers control appropriate safety regulations for the production, distribution, storage, handling, transport, and application of fertilizers; evidence-based SPS measures and standards (which is consistent with WTO rules); and limitations and guidelines on harmful contents of fertilizer products. Further, it encourages international harmonization of quality assurance methods, including weights, labeling, and packaging. Fertilizer regulation is also related to several of the Sustainable Development Goals (SDGs) of the 2030 Sustainable Development Agenda, including SDG 1 (no poverty), 2 (zero hunger), 6 (clean water and sanitation), 9 (industry, innovation and infrastructure), 13 (climate change), 14 (life below water), and 15 (life on land).

At the continental level, African countries including Malawi have made commitments related to fertilizer in the 2003 Maputo Declaration, the 2006 Abuja Declaration on Fertilizer for an African Green Revolution, and the 2014 Malabo Declaration under the Comprehensive Africa Agriculture Development Programme (CAADP), which, among other things, are designed to improve farmers' access to fertilizers in order to double agricultural productivity, end hunger, and halve poverty by 2025. However, most countries, including Malawi, are yet to encapsulate these commitments in their national policy, legal and regulatory frameworks. At the regional level, within sub-Saharan Africa (SSA), the Southern African Development Community (SADC) and the Community for Eastern and Southern Africa (COMESA), of which Malawi is a member, are in the process of developing harmonized fertilizer rules. The East African Community (EAC) is also in the process of putting in place regional fertilizer rules, although its process is more advanced, with a draft Fertilizer Policy and Bill that are currently at an advanced stage. Only the Economic Community for West African States (ECOWAS) has developed regional fertilizer rules under Regulation C/Reg.13/12/12 Relating to Fertilizer Quality Control in the ECOWAS Region. This ECOWAS fertilizer regulations embodies good practices on fertilizer regulation, including free movement of fertilizers, truth in labeling, standard quality and labeling requirements, inspection and analysis requirements, tolerance limits for nutrient deficiency, weight and maximum allowable metal limits, licensing of fertilizer producers and dealers, right to appeal and confidentiality, modalities on regulation of manufacturing and import, and administrative oversight. Malawi's fertilizer regulatory framework could draw upon these international and regional fertilizer regulatory practices as the enabling environment for fertilizer is updated.

This policy and legal review is designed to assess the Malawi National Fertilizer Policy and draft Fertilizer Bill, highlighting possible areas for refinement. The analysis addresses both specific challenges in the fertilizer sector and overarching issues that will need to be addressed under the legal framework to establish an effective enabling environment. The assessment has been developed based on extensive research and stakeholder input that highlights practical implementation challenges that currently exist and will become more pressing as the new law and regulations are finalized and applied in practice. This legal review has been made possible through a collaboration between the African Fertilizer and Agribusiness Partnership (AFAP) and the New Markets Lab (NML), a center for law and development that has worked extensively on the regulation of agricultural inputs, with the support of the Alliance for a Green Revolution in Africa (AGRA).

The assessment analyses Malawi’s current fertilizer policy, legal, and regulatory framework, followed by a discussion of key fertilizer regulatory principles based on international, regional, and national good practices. The final section benchmarks Malawi’ Fertilizer Policy and current Fertilizer Bill against these good practices, identifying policy and legal gaps and recommendations on key regulatory options that could be considered in Malawi’s fertilizer law and regulations.

Table 1 below summarizes the assessment’s main findings. The highlighted parts of the table note key regulatory practices that are not (adequately) addressed in either the Policy or Bill, which could result in ineffective regulation of the fertilizer sector unless addressed.

Table 1: Assessment Findings and Summary of Legal and Regulatory Options

No.	Key Fertilizer Policy and Regulatory Principles	Policy Statement under the Fertilizer Policy	Is the Principle Included in the Current Fertilizer Bill	
			Y/N	Summary Recommendations
1	Appropriate National Institutional Arrangements	Yes	Yes	<p>Contrary to the Fertilizer Policy, Clause 8 of the Fertilizer Bill on the Functions of the Commission does not cross-reference relevant regional and international agreements, conventions, and standards. This is an important dimension and could be addressed by adding a sub-clause.</p> <p>While the Policy requires creation of a National Fertilizer Regulatory Commission (NFRC) and a Fertilizer Board, the Bill does not include the Fertilizer Board. One recommendation would be to maintain this</p>

				approach in the law in order to streamline administration of the system.	
2	National Quality Control System	Yes	No	The draft Fertilizer Act is currently silent on quality standards and, in order to align with good practices, it should include a provision stating that standards will be developed under the Fertilizer Regulations in accordance with international and regional standards, with the Regulations setting out detailed procedures for fertilizer sampling, inspection, and chemical analysis where relevant.	
	a) Fertilizer Standards				
	(i) Quality Standards		Yes	Yes	To reinforce the Fertilizer Policy, and to ensure quality assurance, the clause on inspection, sampling and analysis in the Bill should be revised to further require that all inspection, sampling, and analysis be done in accordance with relevant standards, which should be prescribed under the Fertilizer Regulations where relevant international standards do not exist.
	(ii) Inspection, Sampling and Analysis				
b) Streamlined Rules on Registration	Yes	Yes	Yes	If fertilizer registration is required, the process should be as streamlined as possible. Accordingly, the provision on the renewal of fertilizer registration could be removed from the Bill. Renewal of fertilizer registration will require reapplication and unnecessary retesting of fertilizer, which will be time-consuming, costly, and will hinder private sector investment in the fertilizer sector. The Fertilizer Bill should also define what constitutes “new fertilizer” under Clause 23 and should define the body that will serve as the “approving authority” responsible for conducting fertilizer and fertilizer blends testing under Clauses 23 and 27, as well as	
(i) Product Registration (or Truth in Labeling)					

				provide greater detail regarding issuance of the certificate of technology release.
	(ii) Facility, Producer, and Dealer Licensing	No	Yes	One particular recommendation for strengthening the Bill would be to remove the clause that mandates that the licensee must annually submit financial reports to the Commission, as it defeats the principle of confidentiality and could negatively impact competition in the market.
	c) Rules on Packaging and Labeling	No	Yes	The Bill's provision on packaging follows good practices.
3	Transparency and Due Process	No	Yes	Although the right to appeal is covered under the draft Bill, in order to avoid confusion, the provisions on appeals that appear throughout the Bill should be compiled and moved to a separate section on appeals; this should include provisions clearly describing the mode of appeal, who can appeal (and where), applicable time limits, weight of an appeal, and further options, if any.
	a) Right to Appeal			
	b) Confidentiality	No	Yes	Confidentiality is included in the draft Bill, but the clause on confidentiality should be expanded to apply to all business information received under the Fertilizer Act, including under applications for licenses, and especially relating to the requirements to provide financial records to the NFRC.
4	Environmental Protection	No	No	The Bill does not adequately address storage, improper use, and disposal and should be revised to include the prohibition of acts that would amount to improper use, storage, or disposal of fertilizer.
	a) Proper Storage			
	b) Proper Fertilizer Use and Disposal	Yes	No	
5	Tariffs and Custom Duties	No	No	N/A The issue of tariffs and custom duties should be adequately addressed under relevant laws.
6	Enforcement (Penalties, Fines, and Damages)	No	Yes	For clarity and ease of reference, all acts that amount to violations under the Fertilizer Act should be listed under the clause on offences. The Fertilizer Bill should also include an option to enable recovery of damages where

				one incurs a loss as a result of breach of the provisions of the Fertilizer Act or Regulations.
7	Research, Extension Services, and Training	Yes	No	N/A
8	Fertilizer Use Promotional Programmes	No	No	N/A
General Recommendation				Contrary to international legal drafting practices and conventions, the Fertilizer Bill prescribes many procedural processes that should be included in the Fertilizer Regulations instead. In addition, the clause under the Bill requiring the Minister to prescribe regulations on price-setting should be removed, as this would negatively impact market demand and supply, hindering private sector investment in the sector.

Introduction

At the national level, countries tend to regulate the fertilizer sector through several legal instruments, which typically include a fertilizer policy, fertilizer act or law, fertilizer regulations, and subsidiary guidelines or other measures. These legal instruments are all related, but each plays a distinct role in the regulation of the fertilizer sector. A fertilizer policy, which is often the first in time among the different legal instruments, provides a foundation of principles and guidelines upon which an act and regulations should be based. It usually contains a situational analysis of the fertilizer sector, the rationale or justification for the legal framework on fertilizer, the goal (vision, mission) and objectives of such a framework, guiding principles in fertilizer regulation, strategic priority areas of focus for binding fertilizer legislation, and implementation mechanisms. It is critical that a fertilizer policy adequately addresses key issues affecting the fertilizer sector, since it lays the foundation for legally-binding fertilizer rules and regulations. Malawi's Fertilizer Act for instance, will be the legally-binding framework on fertilizer once enacted, and will advance the articulated policy objectives and guiding principles and actualize the policy strategic priority areas. A fertilizer act will often establish fertilizer regulatory governance structures; set rules for activities along the fertilizer value chain, including manufacturing, importing, exporting, distributing, marketing, storage, trade, and use; and describe enforcement measures, including fines and penalties. While a fertilizer act is legally-binding, it is incomplete without implementing regulations and will also often rely upon supporting guidelines and other measures that set out procedural rules for the act's practical application.



National fertilizer legislation should be aligned with regional and international good regulatory practices and with relevant instruments to which the respective country is a signatory. Regional regulation of fertilizer movement can also be important for ensuring product safety and efficacy, standardizing weight of shipping containers, and enhancing consistency in rules regarding chemical components. Quality control issues for fertilizer are also paramount and have significant implications across borders. Harmonizing and mutually recognizing standards and procedures can help align systems and increase adherence with international standards, ultimately helping to address both quality issues and challenges of adulterated and counterfeit fertilizers.

The Fertilizer Legal Framework in Malawi

Fertilizer in Malawi is currently regulated under the Fertilizer, Farm Feeds and Remedies Act of 1970 and Fertilizer Regulations G.N. 142/1970 (as revised under GN.64/1996. This law and its regulations are out of date and do not reflect the current issues affecting the fertilizer sector. Moreover, as its name suggests, the Fertilizer, Farm Feeds and Remedies Act covers fertilizer together with farm feeds, yet the two are very different. To address this gap, the government of Malawi developed a National Fertilizer Strategy (NFS) in 2012. The NFS, among other things, identifies fertilizer supply- and demand-side constraints, highlights the importance of updating the legal framework on fertilizer and aligning it with regionally harmonized fertilizer rules and international best practices, and sets out priority areas for intervention through short-, medium-, and long-term actions to enable development of a private sector-led fertilizer market. The NFS laid the foundation for the drafting of the Fertilizer Policy, which was recently officially launched on April 8, 2021.¹

The Fertilizer Policy recognizes that prompt access to adequate quality fertilizer has continued to be a problem in Malawi. Adulteration and weak implementation of quality standards remain persistent challenges. Despite the state subsidy programme, fertilizer demand and use are low, and farmers mainly use unregulated organic and bio-organic fertilizers. Private sector involvement in the sector is also limited, and Malawi's Fertilizer Policy notes that there are only two fertilizer blending companies in Malawi and that tax is imposed on the blending ingredients they use. Although mineral deposits have been discovered, there is no local production of inorganic fertilizer. The Fertilizer Policy also notes the need to improve the sector and invest more in research and extension services.

To address gaps in the enabling environment, the Fertilizer Policy identifies seven priority areas: farmers' access to high-quality fertilizers; institutional development and coordination; public investment and support; research, development and extension support; private-sector led fertilizer

¹ See: <https://www.maravipost.com/malawis-launched-national-fertilizer-policy-to-attract-bankable-investorstame-counterfeit-products/>.



industry development; fertilizer quality standards and truth in labelling; and sustainability and environmental management.

Malawi's Fertilizer Policy identifies the absence of effective fertilizer legislation as a major challenge to the development of the fertilizer sector. The Fertilizer Strategy was never implemented, and the Farm Feeds and Remedies Act of 1970 is considered to be outdated and incapable of addressing most current issues affecting the fertilizer sector, as noted, including issues related to adulterated and counterfeit fertilizer, fertilizer production, quality standards for organic and bio-fertilizer, and appeals and confidentiality, among other things. The Policy notes that while development of a new fertilizer law has been long overdue, a fertilizer bill could only be tabled before parliament after the Fertilizer Policy was approved. Now that the Fertilizer Policy is in place, the development of a new Fertilizer Act and Regulations is also underway.

As it is developed, it is important that Malawi's legal and regulatory framework for fertilizer be aligned with international rules and standards existing good regulatory practices. This is likely to accelerate the accessibility, availability, and affordability of fertilizer at the national and regional levels. Further, Malawi is a member of both COMESA and SADC, and, while these RECs are yet to develop harmonized rules on fertilizer, Malawi's new National Fertilizer Policy and draft Fertilizer Bill will be benchmarked against relevant rules and practices as contained in the SPS and TBT Agreements, international standards such as those under the Association of Official Analytical Chemists (AOAC) and International Organization of Standardization (ISO), the 2019 International Code of Conduct for the Sustainable Use and Management of Fertilizers, regional principles (such as those contained in the 2012 ECOWAS Fertilizer Regulations and draft EAC Fertilizer Policy and Bill), and some national laws of SADC and COMESA member countries. The analysis will further highlight possible areas to address in the draft Bill's provisions and Regulations that are under development.

International and Regional Rules Relevant to Fertilizer

While there is no international agreement on fertilizer, global rules and standards do cover aspects of the sector. Under WTO rules, for example, countries are required to comply with the TBT Agreement,² which governs technical regulations and standards, and the SPS Agreement, which applies to measures affecting human, animal, or plant life or health.³ The TBT Agreement requires that technical regulations, which are mandatory government measures, and standards (compliance is not mandatory) are applied and maintained in a way that do not hinder international trade. Where

² WTO Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120. Available at: https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

³ WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493. Available at: https://www.wto.org/english/docs_e/legal_e/15-sps.pdf.



they exist, international standards should be followed.⁴ Technical regulations should not be trade-restrictive and should be published once adopted.⁵ At the international level, relevant fertilizer standards that countries could incorporate into national laws include the fertilizer standards set by the International Organization on Standardization (ISO) and fertilizer analysis methods set by the Association of Official Analytical Chemists (AOAC). The WTO SPS agreement, on the other hand, applies to measures that relate to human, animal, or plant life or health, such as permitted fertilizer residues in food.⁶ In cases where plant propagating material is the final product consumed as food, SPS rules apply to avoid harm to human and animal health. SPS measures must be science-based and not cause arbitrary or unjustifiable discrimination, and they should be based on international standards where they exist.⁷ The provisions in the WTO SPS and TBT Agreements are also incorporated into RTAs, including RECs and Agreement Establishing the AfCFTA.

The 2019 Food and Agriculture Organization International Code of Conduct for the Sustainable Use and Management of Fertilizers is a soft law measures that provides guidance for national fertilizer rules.⁸ This Code embodies guidelines that countries can follow in the regulation of fertilizer to enable sustainable and responsible fertilizer use and avoid negative impacts on human, animal, and soil health and the environment. Among other things, the Code among guides countries to implement a fertilizer policy, quality control, and registration system, when appropriate, which should include penalties for non-compliance when deemed necessary and wherever possible; regulate the composition and quality of fertilizers; promulgate and control appropriate safety regulations for the production, distribution, storage, handling, transport, and application of fertilizers; regulate evidence-based safety standards, limits, and guidelines on harmful contents of fertilizer products; and harmonize at the international level, particularly with respect to quality assurance methods. The Code notes that the promulgation of proper fertilizer regulation at the national level would play an important role in achieving several of the UN SDGs. According to the International Fertilizer Association (IFA),⁹ effective fertilizer regulation would enhance achievement of SDG 1 on no poverty through creating surplus income for farmers where yields increase due to improved availability, accessibility, and affordability of fertilizer; SDG 2 on zero hunger through increase crop productivity resulting from fertilizer use; SDG 6 on clean water and sanitation through enforcement of fertilizer best use and management practices; SDG 9 on industry, innovation, and infrastructure, through creating an enabling environment for private

⁴ Article 2 of the WTO TBT Agreement. See also: World Trade Organization, The WTO Agreement Series: Sanitary and Phytosanitary Measures, page 16, available at: https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf.

⁵ Article 2 of the WTO TBT Agreement.

⁶ Article 5 of the WTO SPS Agreement. See also: World Trade Organization, The WTO Agreement Series: Sanitary and Phytosanitary Measures, page 16, available at: https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf.

⁷ Article 2 of the WTO SPS Agreement.

⁸ FAO International Code of Conduct for the Sustainable Use and Management of Fertilizers, 2019, Rome. Available at: <https://doi.org/10.4060/CA5253EN>.

⁹ International Fertilizer Association, The Crucial Role of Plant Nutrition in The 2030 Sustainable Development Agenda, available at: https://www.fertilizer.org/public/fertilizer_Topics/SDGs.aspx.



sector investment in the fertilizer sector; and SDGs 13 on climate action, 14 on life below water and 15 on life on land through encouraging improved fertilizer use and management practices, such as Integrated Plant Nutrient Management (IPNM), which entails using on-farm organic sources of nutrients and supplementing them with manufactured fertilizers.

There has been a continued push by stakeholders at the continental level to strengthen efforts across African States and regions to support a wider agenda to raise agricultural productivity.¹⁰ The meetings during the tenth anniversary of the Comprehensive Africa Agriculture Development Programme (CAADP) in 2014, followed by the Malabo Declaration that same year, encapsulated commitments for agricultural growth across the continent, including measures to improve farmers' access to quality fertilizers in order to double agricultural productivity, end hunger, and halve poverty by 2025.¹¹ Consequently, these policy goals are linked with national and sub-regional level fertilizer frameworks. Before the Malabo Declaration, African Union countries had made a number of policy commitments under the Maputo Declaration of 2003 and the subsequent Abuja Declaration on Fertilizer for an African Green Revolution in 2006. These commitments include increasing fertilizer use in SSA through reducing the cost of fertilizer procurement at the national and regional levels, particularly through the harmonization and alignment of policies and regulations to ensure duty- and tax-free movement across regions and the development of capacity for quality control.¹² While the harmonization of regional fertilizer rules was scheduled to be implemented by 2007, this has not happened in most African RECs.

At the regional level, within sub-Saharan Africa only ECOWAS has adopted regionally harmonized fertilizer regulations under Regulation C/Reg.13/12/12 Relating to Fertilizer Quality Control in the ECOWAS Region.¹³ The Regulation, which is largely based on the ex-post regulatory approach of truth-in-labeling, embodies key fertilizer regulatory principles, detailing

¹⁰ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

¹¹ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019. See also, Bocar Diagana, et al., ECOWAS Fertilizer Regulatory Framework: Implications for the Development of Private Sector-Led Supply of Quality Fertilizers in West Africa, Policy Brief, IFID, December 22018. Available at: <https://www.canr.msu.edu/contentAsset/raw-data/019e5d-e652-4890-bf5a-89c7a6ea31ae/fileAsset/byInode/1?random=32601>.

¹² New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), "Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA", 2017. See also: New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

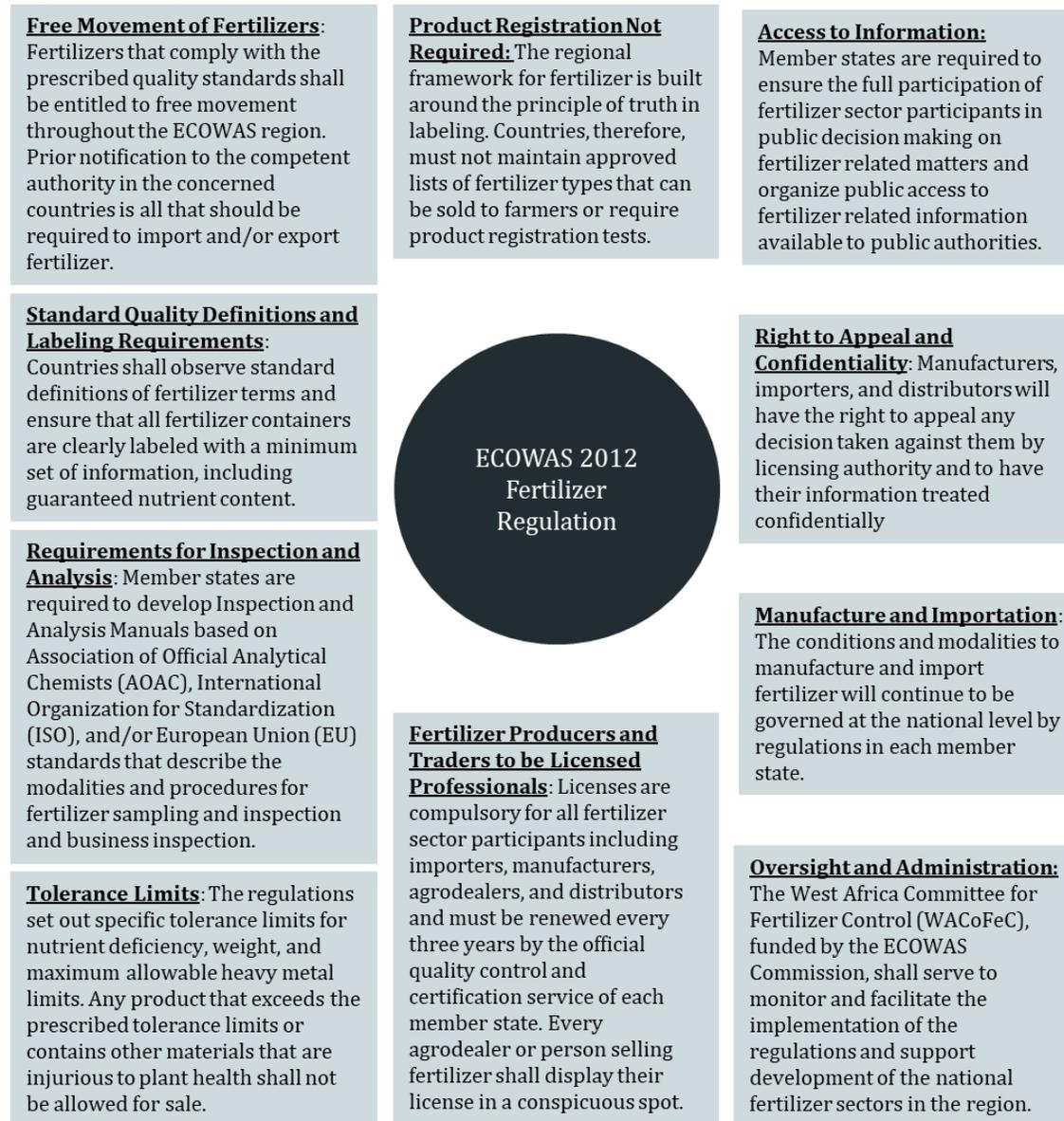
¹³ Regulation C/Reg.13/12/12 Relating to Fertilizer Quality Control in the ECOWAS Region, available at: https://documentation.ecowas.int/download/en/legal_documents/regulations/acts/REGULATION%20CREG.131212%20RELATING%20TO%20FERTILIZER.pdf.



several procedures for streamlining the functioning of national and regional fertilizer markets (see Figure 1 below summarizing the aspects of the ECOWAS Fertilizer Regulation). Notably, ECOWAS member countries need not maintain approved lists of fertilizer types that can be traded in national and regional markets. In principle, any fertilizer can be imported into another ECOWAS country as long as the producer or dealer has the requisite licenses, the fertilizer has been inspected and analyzed in accordance with testing manuals that align with ISO and AOAC standards, the fertilizer is truthfully labeled, and the fertilizer does not contain any substances harmful to animal and plant health and the environment. The ECOWAS Regulations further recognize transparency and due process by requiring that ECOWAS Member States provide for a right to appeal under national laws and ensure that business information is kept confidential. The regulatory principles in the ECOWAS Fertilizer Regulation improve consumer confidence, streamline regulation of fertilizer value chain activities, and minimize border delays,¹⁴ and they incorporate good practices that could be adopted more broadly.

¹⁴ John C. Keyser, et al, Towards an Integrated Market for Seeds and Fertilizers in West Africa, January 2015. World Bank. Available at: <https://documents1.worldbank.org/curated/en/886471468119063004/pdf/936300REVISED00REVISED0FINAL0T00DC.pdf>.

Figure 1: Key Provisions of the ECOWAS Fertilizer Regulation¹⁵



Source: ECOWAS 2012 Fertilizer Regulations adapted by © 2019, New Markets Lab; also see John C. Keyser et al (2015)

¹⁵ Figure based on the ECOWAS Fertilizer Regulation, as included in New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017, See, John C. Keyser, et al., Towards an Integrated Market for Seeds and Fertilizers in West Africa, January 2015. World Bank. Available at: https://documents1.worldbank.org/curated/en/886471468119063004/pdf/936300REVISED00REVISED0F_INAL0T00DC.pdf. See also, New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.



Other regional economic communities (RECs) are still undergoing the process of establishing regional rules. Within COMESA, the Alliance for Commodity Trade in Eastern and Southern Africa (ACTESA), COMESA's implementation agency, is leading the process of developing regional fertilizer rules in collaboration with AFAP through a joint programme on supporting the establishment of a regional fertilizer policy and regulatory framework for Eastern and Southern Africa.¹⁶ As part of this effort, NML and AFAP developed *Guidelines for Regional Harmonization of Regulations in COMESA* in 2017, describing fertilizer regulatory good practices aimed at increasing trade and availability of fertilizer at the COMESA level.¹⁷

Under SADC, the development of Harmonized Regional Guidelines on the Use and Disposal of Agrochemicals and Fertilizers has been underway since 2016.¹⁸ These harmonized fertilizer guidelines would operate in tandem with other SADC instruments such as the Revised Regional Indicative Strategic Development Plan (RISDP) 2015-2063, the Dar-es-Salaam Declaration on Agriculture and Food Security of 2004, and the SADC Regional Agricultural Policy (RAP),¹⁹ which are all aimed at increasing regional trade in agriculture and improving farmers' access to markets. In particular, the SADC RAP includes the harmonization of fertilizer policies as a key input and objective,²⁰ and it also includes the proposal to create regional fertilizer associations.²¹ Nevertheless, there is currently no instrument that includes any binding obligation on SADC Member States related to the harmonization of fertilizer regulations, and for now the RAP can merely serve as guidance for SADC Member States to achieve common measures and objectives.²²

¹⁶ New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), "Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA", 2017.

¹⁷ New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), "Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA", 2017.

¹⁸ South African Research and Documentation Center, SADC Developing Harmonised Agrochemicals, Fertilizer Guidelines, SANF 16 No.13, May 17, 2016. Available at: <https://www.sardc.net/en/southern-african-news-features/sadc-developing-harmonised-agrochemicals-fertilizer-guidelines/>.

¹⁹ SADC, Regional Agricultural Policy (RAP) Country Summary Agricultural Policy Review Reports, January 2011, available at https://www.sadc.int/files/7113/5293/3509/Regional_Agricultural_Policy_Review_Reports_2011.pdf.

²⁰ SADC, Regional Agricultural Policy (RAP) Country Summary Agricultural Policy Review Reports, January 2011, p. 123, 259, available at https://www.sadc.int/files/7113/5293/3509/Regional_Agricultural_Policy_Review_Reports_2011.pdf.

²¹ SADC, Regional Agricultural Policy (RAP) Country Summary Agricultural Policy Review Reports, January 2011, p. 153, available at https://www.sadc.int/files/7113/5293/3509/Regional_Agricultural_Policy_Review_Reports_2011.pdf.

²² New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), "Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA", 2017.



In the EAC, the intention to develop harmonized regional rules on fertilizer was communicated in 2013,²³ and a draft Fertilizer Policy and Fertilizer Bill were developed in 2020 and are currently at advanced stages. The draft EAC Fertilizer Policy and Bill, the Guidelines for Regional Harmonization of Regulations in COMESA, and the ECOWAS Fertilizer Regulations highlight important fertilizer regulatory good practices that have application at the national level to streamline fertilizer regulation and enable wider access to national and regional markets. These good practices will be noted throughout this report.

Table 2: Harmonized Fertilizer Regulatory Frameworks in Sub-Saharan Africa.

<i>Regional Economic Community</i>	COMESA	SADC	EAC	ECOWAS
<i>Harmonized Fertilizer Rules (Y/N)</i>	No (Process initiated)	No (Drafting process initiated)	No (Draft Fertilizer Policy and Bill developed and undergoing approval)	Yes Regulation C/Reg.13/12/12 Relating to Fertilizer Quality Control in the ECOWAS Region

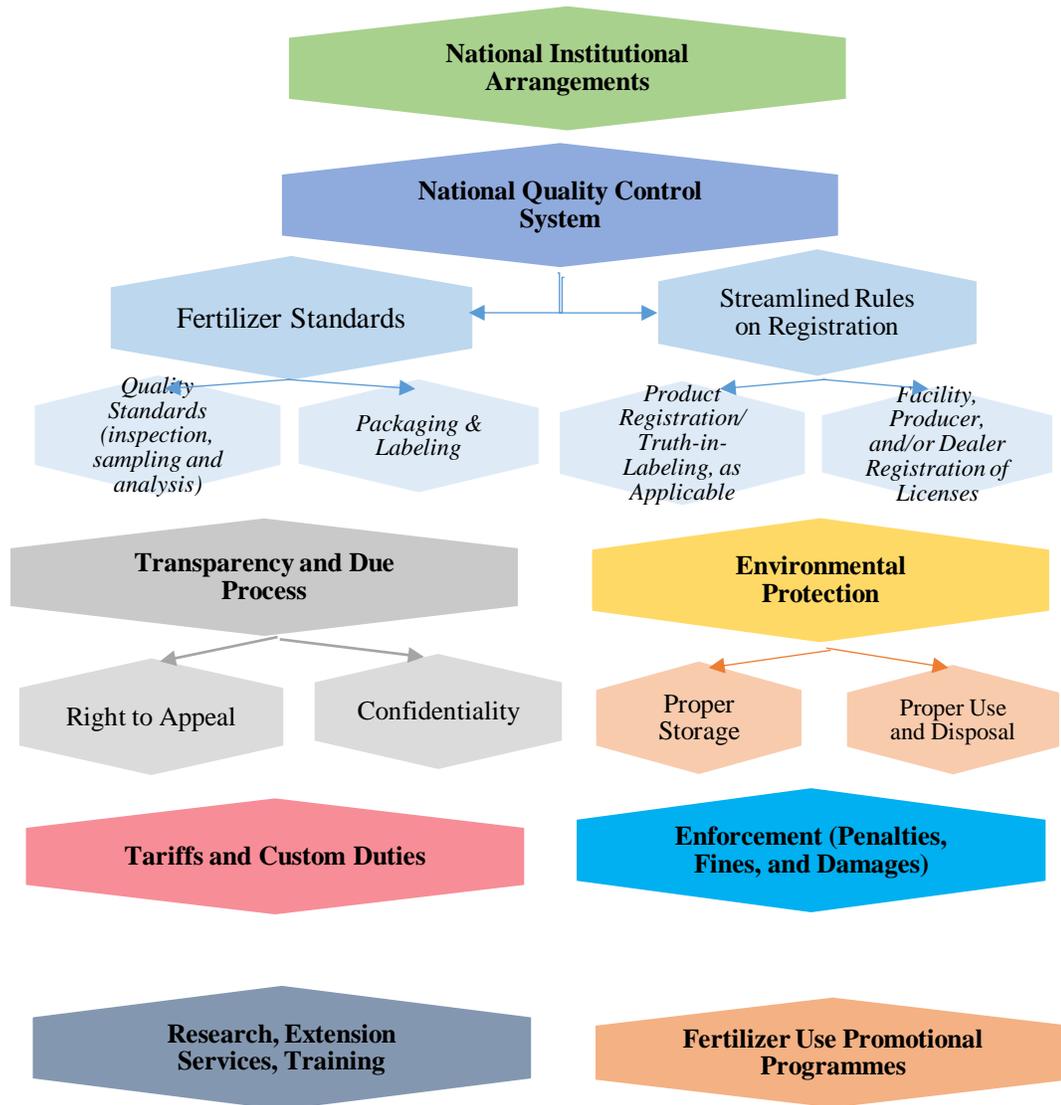
Good Practices in Fertilizer Regulation

International and regional rules relevant to fertilizer, as discussed in the section above, incorporate a set of regulatory good practices and principles to guide the development of national fertilizer policy and legal frameworks. Alignment of national fertilizer policy, legal, and regulatory frameworks with international and regional good practices not only affords legitimacy to national fertilizer regulatory systems, but it can also enable access to wider fertilizer markets and stimulate private sector participation and investment, which in turn can enhance accessibility, availability, and affordability of fertilizers for farmers. Figure 2 below summarizes key fertilizer policy, legal, and regulatory good practices based on international and regional rules and guidelines. Each of

²³ Ubwani, Zephania. *EAC Set to Harmonise Seed, Fertiliser Policies*. The Citizen, Oct. 14, 2013. Web. Nov. 3, 2014. Available at: <https://www.thecitizen.co.tz/News/EAC-set-to-harmonise-seed--fertiliser-policies--/1840392/2031260/-/luafbcz/-/index.html>.

these good practices is discussed below, with examples of national regulatory approaches in selected COMESA and SADC countries, as these are the RECs of which Malawi is a member.

Figure 2: Key Fertilizer Policy, Legal, and Regulatory Principles



Source: New Markets Lab, 2021. Adapted From International and Regional Fertilizer Regulatory Instruments and Best Practices



1. National Institutional Arrangements

International and regional fertilizer regulatory rules recognize that national regulation of the quality, production, sale, and distribution of fertilizers requires appropriate institutional arrangements and regulatory frameworks.²⁴ Without a functional system, there is heightened risk of adulterated and counterfeit fertilizers, improper fertilizer use and disposal, and threats to human and environmental safety.²⁵ In most countries, some sort of national fertilizer regulatory body will serve to monitor implementation of fertilizer legal and regulatory instruments, including a country's policy, a fertilizer act or law, regulations, and any other relevant legal instruments. A regulatory authority at the national level can also coordinate with designated regional authorities concerned with matters of fertilizer within the relevant regional economic community.²⁶

It should be noted, however, that this coordinating institution can take different forms and may fall within a department of the responsible ministry instead of being established as an independent regulatory body. In general, there are two main institutional approaches established by regulations: 1) a department responsible for fertilizer within the ministry responsible for agriculture; or 2) a National Fertilizer Regulatory Authority (NFRA) and/ or a Fertilizer Board. There are pluses and minuses to these different institutional frameworks, and the choice of the appropriate fertilizer regulatory body could be based on an assessment of tradeoffs relevant to a particular country. The experiences of other countries, Table 3 below, should also be considered. It is a common regulatory practice for countries with an NFRA to allow it semi-independence in order to fully focus on relevant fertilizer issues; sometimes a Board is established under an NFRA that includes key stakeholders from both the public and private sectors to encourage more private sector engagement in regulatory issues and holistically represent interests and expectations in the legal framework and its implementation. Creation of a separate regulatory entity like the NFRA, however, comes at a significant cost, including operational expenses, office space, and the need for trained personnel. Where funds are limited, the effective operation of an NFRA can be significantly affected, which can negatively impact its ability to exercise regulatory observation over activities

²⁴ Under the ECOWAS Fertilizer Regulations, the Draft EAC Fertilizer Policy and Bill, and the International Code of Conduct for the Sustainable Use and Management of Fertilizers, national fertilizer regulatory institutions have been recognized as critical to the implementation of fertilizer rules. See also, New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019. See also New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), "Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA", 2017.

²⁵ Draft EAC Fertilizer Policy, 2020.

²⁶ Draft EAC Fertilizer Policy, 2020.



along the fertilizer value chain. Moreover, in some countries in which an NFRA and/or Fertilizer Board exist, the system can tend to be heavily bureaucratic.

Considering some of these factors, some countries have opted to instead identify a department within the ministry responsible for agriculture as the institutional regulatory body for the fertilizer sector.²⁷ This is usually done to save resources and avoid creation of bodies with duplicative functions. Unlike an NFRA which usually has a hybrid board with both private and public stakeholders, a department within the ministry responsible for agriculture may not have a mandate to actively include private sector stakeholders in the regulation of the fertilizer sector. Some stakeholders in countries where a ministerial department is the institutional regulatory framework have reported limited inclusion of the private sector in making decisions on regulation of the fertilizer sector.

Table 3: Selected Countries’ Fertilizer Institutional Frameworks

Tanzania	Zambia	South Africa	Kenya	Mozambique	Zimbabwe	Rwanda
Tanzania Fertilizer Regulatory Authority (TFRA), which is comprised of private and public stakeholders	Department responsible for fertilizer (and Registering Officer) within the Ministry of Agriculture and Livestock	Department responsible for fertilizer (and officer) within the Ministry of Agriculture, Land Reform, and Rural Development	Fertilizer and Animal Foodstuffs Board, which is comprised of public and private sector stakeholders	The Fertilizer Regulatory Authority (TFRA), housed within the National Directorate for Agrarian Services within the Ministry of Agriculture and Food Security	Department responsible for fertilizer (and Registering Officer) within the Minister of Lands, Agriculture and Rural Resettlement	Rwanda Inspectorate, Competition and Consumer Protection Authority (RICA), responsible for regulating agro-inputs, including fertilizer

2. National Quality Control System

Fertilizer quality is a central factor in fertilizer regulation. International and regional measures and guidelines, including the International Code of Conduct for the Sustainable Use and Management of Fertilizers, the ECOWAS Fertilizer Regulations, and the EAC Fertilizer Policy and Bill cover regulatory quality control, which is central to improving fertilizer trade and use at the national level. Fertilizer quality must be assured along the entire fertilizer supply chain in order to address issues such as adulteration and counterfeiting. An effective national quality control system would

²⁷ See Table 3 below on selected countries’ fertilizer institutional frameworks.



greatly facilitate national fertilizer trade and enhance fertilizer use. Intertwined with quality assurance are fertilizer standards, a quality control system (often in the form of registration of fertilizer or truth in labeling), registration of fertilizer dealers, and packaging and labeling. Each of these issue areas should be reflected in the fertilizer policy framework and resulting rules and regulations.

a. Fertilizer Standards

Fertilizer standards set out detailed procedures for fertilizer sampling, inspection, and chemical analysis. A typical quality inspection and analysis process covers uniform particle size, moisture content, nutrient content for compound fertilizers, and presence and levels of heavy metals like cadmium, selenium, mercury, and arsenic as well as proper documentation, integrity (reliability) of bags, and proper and correct labeling.²⁸ In accordance with the WTO TBT Agreement, national fertilizer standards should align with international standards where possible, such as those under ISO and the AOAC.²⁹ Precedent for this exists at the national levels in South Africa, Tanzania, Kenya, Uganda, Rwanda, and other countries; as well as at the regional level within the ECOWAS Fertilizer Regulations and EAC Fertilizer Bill and Fertilizer Standards. Policy and legal frameworks should reference or establish fertilizer standards for both organic and inorganic fertilizers. The main body responsible for implementing and monitoring the regulatory framework for standards is generally the Bureau of Standards, which inspects the quality of fertilizers imported and distributed and enforces standards nationally.³⁰ The legal framework should emphasize the infrastructure necessary for implementing standards, including the enhancement of laboratory capacity; hiring, training, equipping, and funding fertilizer inspectors and laboratory technicians; and authority and resources to carry out their missions.³¹

²⁸ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019. See also New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017.

²⁹ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019. See also New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017.

³⁰ New Markets Lab, AGRA, and AFAP, A Review of National Fertilizer Regulatory Authorities in Malawi, USAID 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Final-Regulatory-Report-Malawi.pdf>.

³¹ Draft EAC Fertilizer Policy, 2020.



(i) Streamlined Regulatory Framework on Packaging and Labeling of Fertilizer

Improper labeling and branding reduces competition and denies farmers the information they need to make purchase decisions, which raises the costs of transactions.³² Countries in COMESA and SADC that have a fertilizer policy and regulatory framework in place have government-mandated labelling requirements that require that fertilizer product packages or containers be labelled to accurately reflect the content inside in order to protect consumers.³³ Producers will often truthfully label their fertilizer products to further guarantee trust between buyers and sellers. As a good practice, the fertilizer policy, regulatory, and institutional framework should ensure that packaging and labeling requirements are complied with by enforcing appropriate fines and penalties for violations, and applying market surveillance techniques, including spot checks and inspections at multiple points along the value chain such as at blending factories, distribution centers, and retail shops.³⁴

Packaging regulations should prescribe the kind of packaging that would be acceptable for solid and liquid fertilizers. If fertilizer is not properly packaged, it could affect its quality. Regulations should describe the appropriate packaging for liquid and solid fertilizers to ensure that the containers do not affect the chemical and nutrient composition of the contents, such as through oxidation. For purposes of environmental protection, countries like Rwanda and Tanzania have prohibited the packaging of solid fertilizer in polythene bags, but they do allow polythene lining of particular specifications inside UV-stabilized woven polypropylene to ensure that fertilizer is not affected by weather conditions.³⁵ Regulations could also allow packaging of different portions of fertilizer, including 5, 10, 25, and 50 kilograms for solid fertilizer and 5, 10, and 20 liters for liquid fertilizer. Allowance of smaller fertilizer packages would improve fertilizer accessibility especially by smallholder farmers.

In line with labeling good practices, regulations should require that the label on the fertilizer package be correct, accurate, and as thorough as possible, providing as much detailed information as possible about the fertilizer in a manner that does not confuse the consumers. The label should have the name of the fertilizer, name and address of the manufacturer and distributor, nutrient content, net content by mass in kilogram, country of origin or manufacture, batch number, production and expiry date, and handling instructions. The information on the label should be affixed on a conspicuous part of the fertilizer package, marked legibly, and indelibly and written in English and the local language.

³² New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019. See also, Draft EAC Fertilizer Policy

³³ See Table 2 below.

³⁴ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

³⁵ Regulations 33 and 34 of the Tanzania Fertilizer Regulation, 2011. Available at: <http://extwprlegs1.fao.org/docs/pdf/tan168712.pdf>.



b. Quality Assurance Through Fertilizer Product Registration and Procedures for Truth-in-Labeling

Policy, legal, and regulatory systems often control fertilizer quality prior to its entry into the market through fertilizer registration requirements; quality control may also be focused on product that is already on the market through truth in labeling and strategic enforcement mechanisms, such as unannounced inspections of wholesale or retail premises.³⁶ If required ex ante, fertilizer registration tends to be based on existence of an approved list, and only fertilizer and fertilizer components that meet the set conditions can be approved, entered onto the list of approved fertilizer, and be imported and sold.³⁷ If applied, fertilizer registration requirements should be science-based and as expedient and accessible as possible in order to facilitate private sector investment in the fertilizer sector. As a good regulatory practice, if required, the length of testing fertilizer should not exceed one season,³⁸ and fertilizer blends of already registered fertilizers should not be subject to additional registration requirements.³⁹ When required, registration of fertilizer products should allow new and innovative products to enter the market in a streamlined fashion, while maintaining safety and quality. Most SADC and COMESA countries have opted for registration of fertilizer products. At the regional level, although the ECOWAS Fertilizer Regulation adopts truth-in-labeling rather than fertilizer product registration, the EAC, which overlaps with COMESA, will also require that fertilizer to be registered under the now Draft Fertilizer Bill.

³⁶ New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017.

³⁷ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

³⁸ Regulation 4(2) of the Tanzania Fertilizer (Amendment) Regulations, 2017. Available at: [https://www.tanzania.go.tz/egov_uploads/documents/THE_FERTILIZER\(AMENDMENTS\)_REGULATIONS_2017_sw.pdf](https://www.tanzania.go.tz/egov_uploads/documents/THE_FERTILIZER(AMENDMENTS)_REGULATIONS_2017_sw.pdf). See also, New Markets Lab and AFAP, Support for the Establishment of a Regional Policy and Regulatory Framework for East and Southern Africa: Country Action Plan Tanzania, USAID an AGRA under the Scaling Seeds And Technologies Partnerships project, 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Country-Action-Plan-Tanzania.pdf>. See also, Franklin Simtowe, Support for the Establishment of a Regional Fertilizer Policy and Regulatory Framework in East and Southern Africa: An Assessment of National Fertilizer Policies, Regulations and Standards for Tanzania, AFAP 2015. Available at: https://www.researchgate.net/publication/297351031_An_Assessment_of_National_Fertilizer_Policies_Regulations_and_Standards_for_Tanzania.

³⁹ Draft EAC Fertilizer Bill. See also, Tanzania Fertilizer Regulatory Authority, Fertilizer Register Book for Registered Fertilizers and Fertilizer Supplements, March 2021. Available at: https://www.tfra.go.tz/uploads/documents/en-1614843022-March%202021%20Fertilizer%20Register_Book%20English.pdf. Page 2 of the Fertilizer Register Book provides that, “Trials are conducted for new fertilizers which contains new nutrients or microorganisms which had never been registered in Tanzania, for new formulations/blends which contain existing nutrients or already register nutrients prior to its registration it requires only laboratory analysis to test its conformity to the standards field evaluation should be optional.”

Truth-in-labeling approaches, such as the ECOWS rules reflect, tend to replace affirmative registration or an approved fertilizer list prior to import and sale of fertilizer. Instead, fertilizer must be truthfully labeled to show the components contained in the fertilizer.⁴⁰ Truthful labeling can improve consumer confidence and minimize border delays, with fertilizer subject to inspection and other quality control measures as needed.⁴¹ In general, the truth-in-labeling approach is considered to be more market-conducive and can help to ease government administrative costs and foster transactions based on trusting the nutrient content information on the bag. It does, however, require sufficient enforcement capacity and institutions, including accredited laboratories with sufficient equipment and trained staff, which most countries, including Malawi, lack.

i. **Streamlined Rules on Registration and Licensing**

Registration and licensing requirements are common under fertilizer policy and regulatory instruments in SSA. However, as noted above, registration of fertilizer, while common in SSA, is not the only approach to quality control, and the private sector tends to prefer truth-in-labeling approaches to mandatory fertilizer registration.

When registration and licensing requirements do apply, it is important that they are streamlined and transparent. These requirements can appear at three levels: (1) fertilizer product registration aimed at quality control, (2) registration or licensing requirements for production and blending facilities, and (3) registration or licensing requirements for producers and agro-dealers.⁴² While registration and licensing can fulfill certain policy objectives, use of these measures may not always be a good practice, particularly if they create additional costs and bureaucratic hurdles without fulfilling a particular objective or create overlapping requirements, all of which are generally not favored by the private sector.⁴³

⁴⁰ New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017. See also, Joshua Ariga, Shannon B. Keating, Katrin Kuhlmann, Nicole M. Mason, and Maria Wanzala-Mlobela, “Creating an Enabling Environment for Private Sector Investment in Fertilizer Value Chains in Sub-Saharan Africa: Empirical Evidence and Knowledge Gaps.” IFDC, Michigan State University, AFAP, and NML, December 2018, available at: <https://www.canr.msu.edu/contentAsset/raw-data/4a52893d-8628-45df-b5bf-58919af58063/fileAsset/byInode/1?random=32601>. See also, New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

⁴¹ Ibid.

⁴² New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

⁴³ Joshua Ariga, Shannon B. Keating, Katrin Kuhlmann, Nicole M. Mason, and Maria Wanzala-Mlobela, “Creating an Enabling Environment for Private Sector Investment in Fertilizer Value Chains in Sub-Saharan Africa: Empirical Evidence and Knowledge Gaps.” IFDC, Michigan State University, AFAP, and NML, December 2018, available at: <https://www.canr.msu.edu/contentAsset/raw-data/4a52893d-8628-45df-b5bf->

With respect to fertilizer product registration, most countries in sub-Saharan Africa, including a number of countries within COMESA and SADC, have opted for fertilizer product registration (see table 4 below). As a good practice, where countries have fertilizer product registration requirements, processes and procedures should be as simple and streamlined as possible, with the fewest number of testing seasons and infrequent renewal periods. These principles also apply in the context of registration and licensing requirements for facilities, dealers, producers, and agro-dealers.⁴⁴

Table 4: Selected countries’ Rules on Fertilizer Product and Dealer Registration

<i>Country</i>	<i>Tanzania</i>	<i>Zambia</i>	<i>South Africa</i>	<i>Kenya</i>	<i>Mozambique</i>	<i>Zimbabwe</i>	<i>Rwanda</i>
<i>Fertilizer Product Registration and Dealer Licensing Required</i>	Yes	Yes	Yes	No	Yes	Yes	Yes

Most countries with a fertilizer regulatory framework in sub-Saharan Africa also maintain requirements for the registration and licensing of fertilizer facilities, importers, exporters, producers, distributors, and sellers.⁴⁵ The terms differ depending upon the type of license and the role of the licensee in the fertilizer value chain. Expensive and bureaucratic registration and licensing requirements can affect investment in the fertilizer sector and delay availability of quality fertilizer to farmers. Licensing and registration processes should be simple and inexpensive, with measures effective enough to ensure quality fertilizer on the market, but also not too stringent so as to curtail private sector investment and engagement in the fertilizer sector.⁴⁶ As a good

58919af58063/fileAsset/byInode/1?random=32601. See also, New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017.

⁴⁴ Joshua Ariga, Shannon B. Keating, Katrin Kuhlmann, Nicole M. Mason, and Maria Wanzala-Mlobela, “Creating an Enabling Environment for Private Sector Investment in Fertilizer Value Chains in Sub-Saharan Africa: Empirical Evidence and Knowledge Gaps.” IFDC, Michigan State University, AFAP, and NML, December 2018, available at: <https://www.canr.msu.edu/contentAsset/raw-data/4a52893d-8628-45df-b5bf-58919af58063/fileAsset/byInode/1?random=32601>.

See also, New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017.

⁴⁵ See Table 4 above.

⁴⁶ New Markets Lab in collaboration with the African Fertilizer and Agribusiness Partnership (AFAP) for the Alliance for a Green Revolution in Africa (AGRA) through the U.S. Agency for International Development (USAID), “Guidelines for Regional Harmonization of Fertilizer Regulations in COMESA”, 2017. See also, Joshua Ariga, Shannon B. Keating, Katrin Kuhlmann, Nicole M. Mason, and Maria Wanzala-Mlobela, “Creating an Enabling Environment for Private Sector Investment in Fertilizer Value Chains in Sub-Saharan Africa: Empirical Evidence and Knowledge Gaps.” IFDC, Michigan State University, AFAP, and NML, December 2018, available at:



regulatory approach, where a fertilizer facility, producer, importer, or exporter is required to be registered, it should be only once or once every 10 years instead of frequently.⁴⁷ For the importer, separate import permits should not be required for each fertilizer consignment.⁴⁸

3. Transparency and Due Process (Confidentiality and the Right to Appeal)

Confidentiality and the right to appeal also good practices that should be considered when designing policy and fertilizer regulatory frameworks. Given that many of the provisions included in the national fertilizer law involve administrative procedures where public entities have the power to determine who can participate in the fertilizer market and under which conditions, the right of market actors to appeal these decisions is critical.⁴⁹ The fertilizer law should address this and designate competent authorities to handle appeals, with the regulations prescribing the procedural rules to be followed. This will guarantee that all actors in the value chain are given fair and transparent treatment when applying for a license or registration.

The information shared with the fertilizer regulatory authorities during licensing and registration is sometimes business information, protection of which is critical to fair competition in the fertilizer sector. The policy, legal, and regulatory frameworks should prioritize confidentiality of key business information provided by applicants during the licensing and registration processes. Notably, the ECOWAS 2012 Fertilizer Regulations and draft EAC Fertilizer Bill include provisions on confidentiality.

4. Protection of the Environment and Human Safety from the Adverse Effects of Improper Fertilizer Use and Disposal

Improper and excessive fertilizer use, storage and disposal can pollute and harm the environment. For instance, improper use and storage of fertilizers may enhance emission of GHG that contribute to global warming and exacerbate climate change. Improper disposal leads to pollution of water bodies through runoff, while unsafe storage may lead to natural disaster, as evidenced by recent disaster in Lebanon. It is thus important that the policy framework consider environmental safety a priority through encouraging soil testing to ascertain nutrient deficiencies, building farmer knowledge around optimal use of fertilizers to mitigate the environmental impacts of fertilizer use, and establishing other policies and procedures to address disposal and storage.

<https://www.canr.msu.edu/contentAsset/raw-data/4a52893d-8628-45df-b5bf-58919af58063/fileAsset/byInode/1?random=32601>.

⁴⁷ New Markets Lab and AFAP, A Comparative Analysis of Fertilizer Accessibility in Ethiopia, Malawi, Mozambique and Tanzania, Study Commissioned by USAID and AGRA under the Scaling Seeds and Technologies Partnership, 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Comparative-Analysis.pdf>.

⁴⁸ New Markets Lab and AFAP, A Comparative Analysis of Fertilizer Accessibility in Ethiopia, Malawi, Mozambique and Tanzania, Study Commissioned by USAID and AGRA under the Scaling Seeds and Technologies Partnership, 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Comparative-Analysis.pdf>.

⁴⁹ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019



5. Tariffs and Custom Duties

Elimination of all taxes on fertilizer imports would increase fertilizer availability, access, and use, as well as improve productivity and food security. Taxes or tariffs on fertilizers translate into increased prices and reduce the financial accessibility for smallholder farmers. While tax and custom duties are not regulated under the fertilizer law and regulation, the relevant provisions of the Customs Procedures Codes (CPC) of the Customs and Exercise (Tariffs) Order should address the issue of taxes on fertilizer blending ingredients. Countries should further analyze the impact of the tax and tariff regimes on the importation, distribution, and use of fertilizer, especially fertilizer blends, and advise on ways to promote availability and access of quality fertilizer, for instance through provision of incentives such as tax exemption. This would, for instance, facilitate investment in the fertilizer sector.

6. Penalties and Enforcement of Regulations

National policy, legal and regulatory frameworks should include effective punitive measures against all acts that compromise the quality of fertilizer in the market, including trading without the required registrations and licenses, obstruction of officials from conducting their legal duties, improper packaging and labeling, trading in counterfeit and substandard fertilizer, among other things. Such punitive measures would ensure compliance with fertilizer laws and regulations and improve implementation of fertilizer quality standards, encouraging the use of quality fertilizer that stimulates crop productivity and protection of plant, human, and animal life and health and environmental protection from the adverse effects of using substandard fertilizer. For legal and regulatory violations, punitive measures can include fines and penalties (including imprisonment for serious violations) and cancellation or suspension of registrations or licenses, along with damages under civil litigation involving an affected party.

7. Research, Extension Services, and Training

National Agricultural Research Services (NARS) are mandated to focus on appropriate agricultural inputs, including fertilizer, and contribute to evidence-based policy making. However, NARS and agricultural extension services are most times underfunded, poorly staffed, and sometimes poorly coordinated. The challenge of continuing declines in public funding and slow participation of the private sector in funding the development and delivery of agricultural inputs, including fertilizer, and supportive services continues to exist. A fertilizer policy and legal and regulatory framework should have the effect of strengthening research and research-extension-training linkages.

8. Fertilizer Use Promotional Programme

A number of countries within sub-Saharan Africa, including Malawi, Kenya, Tanzania, Mozambique, and Uganda, among others, have support mechanisms aimed at facilitating increased fertilizer use by farmers, including through subsidies and other programs. While some of these



initiatives have effectively promoted fertilizer use in some countries,⁵⁰ challenges continue to exist, including limited finance to sustain the programmes and inefficiency and ineffectiveness in channeling fertilizer support programs to target low-income farmers. For instance, consultation under a study conducted by NML in 2019 showed that some of the fertilizer intended for smallholder farmers in Kenya was repackaged and resold on the market and sometimes even exported to neighboring countries such as Rwanda.⁵¹ Moreover, improperly planned and executed fertilizer distribution programs could disrupt, distort, or erode the commercial demand for fertilizer that is necessary to develop well-functioning private fertilizer delivery systems.⁵² It is, therefore, a good regulatory practice that the fertilizer policy framework prioritize fertilizer use promotional programmes that are strategically introduced and implemented in a manner that does not disrupt, distort, or obstruct the private competitive fertilizer market. Such programmes should also be closely monitored to ensure that the support mechanisms and facilities aimed at improving fertilizer use go to the targeted beneficiaries and that an exit strategy from fertilizer use promotional programs is put in place.

9. Strengthen Value Chain Actors' Capacity

Fertilizer use in sub-Saharan Africa is still low, partly because of knowledge and capacity gaps on both the demand and supply sides. On the demand side, fertilizer use by farmers can increase when soil fertility and fertilizer knowledge constraints are addressed. Awareness needs to be built regarding soil fertility management and the role that organic and inorganic fertilizers can play in improving and sustaining soil fertility for crop production. On the supply side, and to enhance the availability of fertilizer on the regional market, affordable finance should be available, as fertilizer is a capital-intensive commodity. Strengthening fertilizer value chain actors' capacity should be a prioritized in the national fertilizer policy, legal, and regulatory framework in order to help ensure: (a) availability of factual information on the benefits of fertilizer to agricultural productivity, (b) extension of logistical support to extension service personnel who are in close contact with farmers, (c) encouragement of soil testing to inform efficient and effective fertilizer use, (d) linkage of organized farmer groups and cooperatives to credit services to enable them to

⁵⁰ Helder Zavale, et al., Dynamics of the Fertilizer Value Chain in Mozambique, *Sustainability Journal*, 2020, 12, 4691; doi:10.3390/su12114691. Available at: <file:///C:/Users/user/Downloads/sustainability-12-04691.pdf>. See also, Tim Njagi, Fertilizer Subsidy Programs in Kenya: Constraints, Opportunities and Lessons, KeFERT Conference KICC, Nairobi 16th - 17th October 2018. Available at: <https://ifdc.org/wp-content/uploads/2018/10/3.3-Ke-Fert-2018-Tegemeo-161018-final.pdf>. See also, Miklyaev, M.; Jenkins, G.; Shobowale, D. Sustainability of Agricultural Crop Policies in Rwanda: An Integrated Cost-Benefit Analysis. *Sustainability Journal* 2021, 13, 48. Available at: <https://dx.doi.org/10.3390/su13010048>

⁵¹ New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.

⁵² New Markets Lab, Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation, Study Emerge Centre for Innovations-Africa for the East African Community Secretariat Under the *Partnership Toward Catalyzing the Implementation of CAADP-Malabo 2017-2020*, Supported by the Alliance for a Green Revolution in Africa, 19 December 2019.



procure fertilizers, (e) support of the development of business skills for various levels of fertilizer dealers to maximize the profits from genuine business, and (f) promotion of availability access, and use of organic fertilizer and agricultural lime.

Recommendations and Fertilizer Legal and Regulatory Options for Malawi

While an effective fertilizer frameworks should incorporate the good practices identified above (see Figure 3), even if these are reflected in policy, not all policy statements translate into enforceable provisions under a legally binding framework (Fertilizer Act and Regulations).

The sub-sections below contain an assessment of Malawi’s current Fertilizer Policy and proposed Fertilizer Bill, with a set of recommendations on provisions based on Malawi’s National Fertilizer Policy and international, regional, and national good regulatory practices, as discussed above. These recommendations could be considered as the Fertilizer Bill and Regulations are developed.

Figure 3: Good Practices in Fertilizer Regulation



Source: © 2019 New Markets Lab



1. National Institutional Arrangements for Fertilizer

(a) Establishment of the National Fertilizer Regulatory Commission

The Fertilizer, Farm Feeds, and Remedies Act and accompanying regulations do not establish an institutional regulatory framework for the fertilizer sector. To address this institutional gap, Malawi's 2021 Fertilizer Policy provides for the creation of a semi-autonomous National Fertilizer Regulatory Commission (NFRC),⁵³ responsible for regulating the fertilizer sector and implementing the fertilizer regulatory framework, including the Fertilizer Act and subsidiary regulations. Under the Fertilizer Policy, the NFRC will collaborate closely with MBS, COMESA, and SADC on matters related to development and implementation of fertilizer standards and regionally harmonized fertilizer protocols. Since the Fertilizer Policy is a guiding framework, the new Fertilizer Act and regulations under development will have to align with the Policy by include legally-binding provisions establishing the NFRC and defining its functions and powers. The provisions establishing the NFRC should allow it enough independence and authority to effectively perform its duties as mandated by law To achieve this, the NFRC should be established as a body corporate, with the powers to sue and be sued; have perpetual succession and a common seal; be capable of entering into contracts in its own name; and be capable of purchasing or acquiring any movable and immovable property. To maintain its neutrality, the Fertilizer Law should prohibit the NFRC from engaging directly or indirectly in any trade or business connected with the production, processing, importation, sale, or distribution of fertilizer.

The functions of the NFRC should be aligned with the duties mentioned under the Fertilizer Policy, including the following:

- Regulating all matters relating to quality of fertilizers;
- Registering all fertilizer dealers and their premises; licensing fertilizer dealers;
- Issuing permits for the importation and exportation of fertilizer; maintaining a register of fertilizers;
- Implementing ratified regional and international conventions relating to fertilizers;
- Regulating and controlling the importation, production, transportation, dealing, storage, and disposal of fertilizer; collecting, maintaining, and publishing information related to fertilizers;
- Making guidelines on the sound management, use, and effective control of fertilizers;
- Conducting public educational campaigns on the sound application and management of fertilizers, in collaboration with Local Authorities;
- Conducting regular training of stakeholders on fertilizer matters;

- Registering inspectors and analysts;
- Inspecting, or causing to be inspected, fertilizer for quality assurance;
- Implementing policies, strategies and programmes relating to fertilizer industry development;
- Providing technical advice to the government and other institutions on all matters relating to fertilizer management and control;
- Conducting or causing to be conducted research relating to fertilizers;
- Fostering co-operation between the institute and other institutions or organizations and stakeholders;
- Collaborating with national and international organizations on all matters relating to the fertilizer; and
- Carrying out any other functions as may be conferred upon it in the performance of its functions under the Act.

The Fertilizer Bill, in tandem with the Fertilizer Policy, provides for the creation of an independent NFRC and defines its composition, functions, powers, and operational procedures. While not in the Policy, the Fertilizer Bill also allows the NFRC to create specialized Committees to assist it in performing its functions by doing such roles as the Commission may direct.

Recommendation for Legal Establishment of the NFRC

Clause 8 on the Functions of the NFRC does not note that the Commission will implement ratified regional and international conventions related to fertilizers, which is an important aspect of integration and harmonization efforts and alignment with obligations under international and regional fertilizer rules. Such a sub-clause should be added.

Consistent with legal drafting conventions, procedural rules should generally either be under a schedule to the Act or the Regulations. It follows that a schedule should be added to the Fertilizer Bill on the composition and procedures of the NFRC with the following provisions that are currently under the Bill: provision 4 on Composition of the Commission, 5 on Committees of the Commission, 6 on Allowances and Expenses, 7 on Functional Independence of the Committee, 10 on Meetings of the Commission, 11 on Attendance of Meetings, 12 on Disclosure of Interest, 13 on the Oath of Confidentiality, 14 on Protection From Liability, and 19 on the Staff of the Commission.

Part II and III of the Fertilizer Bill address the same issue, namely administration. These two parts should be combined into one, titled “Administration”, retaining the following provisions: 1 on establishment of the NFRC, 8 on function of the Commission, 9 on Powers of the Commission, (combine) 15 and 16 on the Director General.



(b) Establishment of the Fertilizer Board

The Policy provides for the NFRC to create a Fertilizer Board with the role of overseeing and generally managing the NFRC.⁵⁴ Since the Policy aims to include the private sector, the composition of the Board could be balanced to include both private and public sector stakeholders. The Board could, for instance, be composed of: (a) a representative from the directorate in charge of fertilizer development in the Ministry responsible for agriculture; (b) a representative from an association of fertilizer dealers to be appointed by the Minister responsible for agriculture on recommendation from respective association; (c) representatives from farmers associations or co-operative societies be appointed by the Minister on recommendation from the respective association; (d) a representative from the national institute responsible for standards; (e) a representative from the national institute responsible for environmental matters; (f) a representative from the national institute responsible for radiation; (g) a representative from higher learning institution/s dealing with soil science and production; and (h) a representative from the national institution responsible for research on soil fertility.

The Fertilizer Bill does not provide for the creation of the Fertilizer Board. It does, however, provide for the NFRC to be comprised of members who would be recommended by a Fertilizer Board. It also describes the tenure of the NFRC members, quorum needed for meetings, procedures for meetings, determination of allowances for members, and other relevant provisions associated with the performance of NFRC member functions.

Recommendation on Fertilizer Board

The NFRC could function without a separate Fertilizer Board. The Fertilizer Policy focuses on inclusion of the private sector in industry regulation, and this is satisfied through the composition of the NFRC with both private and public sector key stakeholders represented. Moving forward without a separate Fertilizer Board could simplify bureaucratic procedures and avoid considering duplicative administrative functions.

2. National Quality Control System

(a) Setting Fertilizer Standards

One of the main objectives of the Fertilizer Policy is increasing compliance with required standards for all types of fertilizer products.⁵⁵ Policy Priority Area 6 of the Policy focuses on fertilizer quality standards notes that an absence of standards for some fertilizers, especially commercialized organic fertilizers has often resulted in adulteration and counterfeiting. The Policy recognizes the need to develop quality standards for all fertilizers and effective monitoring of their implementation through improved testing and inspection services. The Fertilizer Bill does not

⁵⁴ Policy Statement 3.2.1, under the National Fertilizer Policy.

⁵⁵ Policy Outcome 2.2(v) of the National Fertilizer Policy.



make a single mention of standards, how they are to be set, by whom, and where they are (to be) contained.

Recommendation on Fertilizer Standards

The Fertilizer Act should reference adherence to international standards and include a provision on development of standards under the Fertilizer Regulations, with the Regulations setting out detailed procedures for fertilizer sampling, inspection, and chemical analysis.

(b) Fertilizer Inspection, Sampling, and Analysis

Currently, the Malawi Bureau of Standards (MBS) is responsible for carrying out inspections and sample testing at the border for quality control.⁵⁶ This latter function is mandated despite pre-import analyses performed by importing companies. MBS employs inspectors who access business premises to assess quantities of product held, take samples of the product for analysis (in their laboratory), conduct verification (which involves sending of a letter to distributor of declared nutrient levels), and decide whether specifications are within the acceptable regulated limits of variation. However, there is only one testing laboratory which is located in MBS headquarters in Blantyre.⁵⁷ Although MBS has qualified analysts who are stationed at every border-post, they are few in number and are unable to conduct retail level quality spot checks for fertilizers. Consequently, little or no post-import sampling and analysis of fertilizer is carried out in Malawi. There is a need to strengthen the laboratory testing capacities, which will include making laboratories more accessible, equipping them with the staff and supplies to meet international standards for fertilizer testing, and maintaining a system for tracing adulterated products back to the source.

Under Policy Priority Area 2 on institutional development, the Fertilizer Policy notes that effective regulation of the fertilizer sector and enhanced availability of high quality fertilizers will require strengthening institutional and human resource capacity through, among other things, appointing and building the capacity of fertilizer inspectors and analysts. To ensure quality control, provision 28 of the Fertilizer Bill allows the NFRC to carry out impromptu sampling and analysis. Provision 30 includes clauses on appointment of analysts and inspectors under the NFRA and allowing them necessary powers to carry out their missions.

Recommendation on Fertilizer Inspection, Sampling, and Analysis

To reinforce the Fertilizer Policy, and to ensure quality assurance, provision 28 or 30 of the Fertilizer Bill should further require that all inspection, sampling, and analysis be done in

⁵⁶ New Markets Lab, AGRA, and AFAP, A Review of National Fertilizer Regulatory Authorities in Malawi, USAID 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Final-Regulatory-Report-Malawi>.

⁵⁷ New Markets Lab, AGRA, and AFAP, A Review of National Fertilizer Regulatory Authorities in Malawi, USAID 2017. Available at: <https://www.afap-partnership.org/wp-content/uploads/2017/06/Final-Regulatory-Report-Malawi>.



accordance with relevant standards, which should be prescribed under the Fertilizer Regulations unless international standards exist.

(c) Prohibition on Dealing in Substandard Fertilizer

The Fertilizer Act should also include a provision prohibiting the manufacturing, importation, exportation, sale, and distribution of any fertilizer that does not conform to applicable standards, which should be prescribed in the regulations. This provision could also describe how substandard fertilizer could be dealt with by the NFRC. This could include, for instance, requiring that substandard fertilizer be seized and disposed of at the cost of the fertilizer dealer in accordance with procedures that should be prescribed in the Regulations to the Fertilizer Act.

Part VI of the Fertilizer Bill on prohibited practices addresses the good regulatory practice of prohibiting dealing in substandard fertilizer. This part of the Fertilizer Bill includes provisions on prohibition of trade in nutrient-deficient⁵⁸ or adulterated fertilizer,⁵⁹ namely adding extraneous material to a standard fertilizer to lower its quality. These are both considered offences, with penalties to be prescribed under the Regulations. Fertilizer found to be adulterated or nutrient-deficient will be seized by the NFRC and disposed of in a manner directed by the NFRC Registrar.

Recommendation on Power of Seizure

Clause 39 on the power of seizure is a bit ambiguous and will need clarification. The Clause provides for the NFRC to seize fertilizer found to be noncompliant and take it to a court of competent jurisdiction for the Registrar to decide whether such fertilizer is in violation. At this stage it could be reasonably presumed that the “Registrar” referred to in the Clause is the Registrar of the High Court. The Bill does not however make this clarification. The only definition of a Registrar within the Bill is in Clause 15, referring to the Director General of the Commission. Taking this definition to refer to the Registrar under Clause 39 would be confusing as it would translate to the Commission being a judge in a case it is also the prosecutor. Clause 39 should clarify and define which Registrar is being referred to.

Additionally, the provision is inconsistent with legal drafting conventions as it includes descriptive procedural rules that are meant to be provided for under the Regulations.

Clause 39 is generally ambiguous and should be revised to provide for the NFRC to seize substandard fertilizer in accordance with procedures to be described under the Regulations. The procedural descriptions should be excluded from the Clause 39 and added to regulations instead. The issue of appeal is a key legal matter, which, as a good regulatory practice, should be included in a separate provision, as discussed below.

⁵⁸ Clause 38 of the Fertilizer Bill.

⁵⁹ Clause 35 of the Fertilizer Bill.



(d) Fertilizer Product Registration

Currently, the regulatory practice in Malawi requires registration of fertilizer in order to appear on a list of approved fertilizers that can be imported and traded within the country. DARS requires companies to provide evidence of three seasons of field trial data prior to registration. While this requirement is not contained in any regulatory instrument, DARS still applies it as an internal policy before approving and registering any fertilizer.⁶⁰ This is notably the longest fertilizer testing time in Africa.⁶¹ Stakeholder feedback has highlighted that the fertilizer registration requirements are time-consuming and present a stumbling block to the operational efficiency and growth of fertilizer companies.⁶² There is no clear process for the registration of blends, and stakeholders have stressed that the preference would be to establish a clear process for declaration of blends or formulations instead of registration.⁶³

The Fertilizer Policy also refers to truth-in-labeling approaches, although this does not appear to mean truth-in-labeling as an alternative to fertilizer registration as discussed above. This is, however, unclear under the Policy, which leaves confusion as to the approach that will be adopted under the legally-binding fertilizer legal and regulatory framework. The National Fertilizer Policy recognizes truth-in-labeling as a priority and a critical part of maintaining quality standards. As a strategic approach, the Policy supports development of private sector initiatives for fertilizer product quality enhancement through establishing internal quality controls, correct branding of fertilizer products, and establishing association-affiliated quality control mechanisms. Although not listed as a key policy statement, the Policy also recognizes the registration of fertilizers and the creation and maintenance of a fertilizer database. The Policy notes though that the relevant laws should be reviewed to reduce the time and cost involved in fertilizer registration.

While the National Fertilizer Policy is ambiguous on the specific fertilizer product quality assurance approach, the Fertilizer Act and Regulations should clarify and streamline a particular approach. If Malawi opts to continue with its current approach of fertilizer registration, the Fertilizer Act should streamline the process and make it as short as possible and the least costly. As a best practice, trials should be one year at most, similar to countries like Tanzania.

The Fertilizer Policy provides for the Fertilizer Act to reduce the time and cost of obtaining fertilizer registration, and for the creation and maintenance of a fertilizer database. To align with the Fertilizer Policy, the Fertilizer Act might require the registration of new fertilizer on a national fertilizer list or database prior to being sold in Malawi. Relevant provisions could also require that fertilizer is subject to field testing for one season and laboratory analysis in accordance with

⁶⁰ IFDC and AFAP, Assessment of Fertilizer Distribution Systems and Opportunities for Developing Fertilizer Blends in Malawi, Study Commissioned by AGRA, June 2018.

⁶¹ IFDC and AFAP, Assessment of Fertilizer Distribution Systems and Opportunities for Developing Fertilizer Blends in Malawi, Study Commissioned by AGRA, June 2018.

⁶² NML Consultation with FAM, 2021. See also, IFDC and AFAP, Assessment of Fertilizer Distribution Systems and Opportunities for Developing Fertilizer Blends in Malawi, Study Commissioned by AGRA, June 2018.

⁶³ NML Consultation with FAM, 2021.

procedures that could be prescribed under the Fertilizer Regulations. “New fertilizer” could be defined under the Fertilizer Act as formulations that have not existed in Malawi before. The Act could exclude custom blends, or mixtures of fertilizers developed to target specific farmer, soil, and crop conditions, from field testing requirements. This is a good regulatory practice and a key recommendation from the private sector and is aimed at ensuring that fertilizer promptly reaches the farmer, in alignment with the Fertilizer Policy’s objectives. Moreover, a custom blend has already been thoroughly tested by a fertilizer company to assess its suitability to the specific customer requirements prior to application, and additional testing need not be required provided that other quality control measures are in place.

To streamline the fertilizer product registration process, the Fertilizer Act should include provisions on the nature of the fertilizer registration application and where it is to be lodged, with detailed procedures prescribed in the regulations. For sake of transparency, and in order to avoid abuse of discretionary powers, the Fertilizer Act should also include a predetermined closed-ended list of conditions under which a fertilizer registration could be suspended or cancelled. Based on good regulatory practices, these conditions could include: (a) obtaining the permit by misrepresentation at the time of application; (b) becoming bankrupt or entering into liquidation; (c) cancelling or suspending the license as necessary to prevent or remove potential hazard to people, crops, animals, or the environment; (d) failing to comply with any conditions of the license; or (e) convicting the licensee of any offence against the provisions of the Fertilizer Act or Regulations.

Part V of the current Fertilizer Bill provides for registration of new fertilizer and fertilizer blends whose formulations are not based on approved formulation guidelines by the approving authority. The Fertilizer Bill does not, however, define what “new fertilizer” or “approving authority”. The Fertilizer Bill does provide details for the application for fertilizer registration⁶⁴ and procedural rules for the application process, including the length of time for determining decisions during the application process. Once granted, a certificate of registration is valid for only two years, subject to renewal upon submission of a new application.

Recommendation on Fertilizer Product Registration

In countries where fertilizer registration is required, it is a good regulatory practice that registration is done only once and that cancellation and deregistration occur under clearly stated conditions. The requirement for renewal of fertilizer registrations will require reapplication and retesting of fertilizer, which will be time-consuming, costly, and will hinder private sector investment in the fertilizer sector.⁶⁵ Moreover, retesting is unnecessary, since registered fertilizer has already been

⁶⁴ The application should be accompanied by a prescribed registration fee, certificate of analysis, safety data sheet, and a valid certificate of technology release.

⁶⁵ Draft EAC Fertilizer Bill. See also, Tanzania Fertilizer Regulatory Authority, Fertilizer Register Book for Registered Fertilizers and Fertilizer Supplements, March 2021. Available at: https://www.tfra.go.tz/uploads/documents/en-1614843022-March%202021%20Fertilizer%20Register_Book%20English.pdf. Page 2 of the Fertilizer Register Book provides



tested and approved. The provision on renewal of fertilizer registrations should accordingly be deleted from the Fertilizer Bill.

The Fertilizer Bill should define what “new fertilizer” under Clause 23 and the “approving authority” responsible for conducting fertilizer and fertilizer blends testing under Clauses 23 and 27 that issues the certificate of technology release. Further, it is contrary to international legal drafting practices that the Fertilizer Bill would prescribe procedural processes; these should be included in the Fertilizer Regulations instead.

(e) Fertilizer Dealer Licensing

Malawi’s National Fertilizer Policy makes no specific statement on fertilizer dealer licensing, but it notes that the NFRC will be responsible for registering fertilizer dealers and maintaining the database of fertilizer companies. Licensing and registration processes should be simple and inexpensive, with measures effective enough to ensure that quality fertilizer reaches the market but not too stringent so as to curtail private sector investment and engagement in the fertilizer sector.

The Fertilizer Act may require that entities obtain a license prior to dealing in the fertilizer business. To streamline the fertilizer dealer registration process, the Act should include provisions on how and where to file an application, with detailed procedures prescribed in the Regulations. As a good regulatory approach, the Fertilizer Act could maintain a validity period of 10 years before requiring that licenses for fertilizer producers, importers, or exporters be renewed.

Clause 29 of the Fertilizer Bill includes requirements for licenses and permits prior to trade in fertilizer in Malawi. The application for a license shall be made to the Director General of the NFRC in the manner prescribed under the Fertilizer Act with payment of a prescribed fee. Once the Director General of the NFRC considers a licensing application to be in order and consistent with the licensing requirements, a license will be granted. Once granted, a license is valid for two years. An import or export permit shall not exceed six months. Applications for renewal of a license shall be made in prescribed form three months before expiry.

Recommendation on Fertilizer Dealer Licensing

Best practices on legal drafting require that procedural guidelines be included in the Regulations instead of the Act. Clause 29 on licensing has 30 sub-clauses, most of which describe procedural rules which should be in the regulations instead.

that, “Trials are conducted for new fertilizers which contains new nutrients or microorganisms which had never been registered in Tanzania, for new formulations/blends which contain existing nutrients or already register nutrients prior to its registration it requires only laboratory analysis to test its conformity to the standards field evaluation should be optional.”



Sub-clauses 29(20) to (23) of the Fertilizer Bill requires the licensee to submit to the Commission all annual financial records they are required to keep under the fertilizer law, with the procedures on submission to be prescribed by the Director General. Failure or refusal to submit these records is an offence subjecting the violating licensee to a prescribed daily penalty and suspension of the license. Record keeping requirements are not articulated under the Fertilizer Bill where it says they are described, yet compliance with them will be a prerequisite to granting a license,⁶⁶ and noncompliance has punitive consequences for the licensee. This renders the above-mentioned provisions of the Bill ambiguous. Moreover, mandatory financial reporting to the Commission by all licensees is uncalled for and is a burdensome requirement likely to discourage investment in the sector and a likely strain to the Director General, who is mandated with auditing all the submitted financial reports. Financial information should be confidential in nature, since in the wrong hands it could negatively affect fair competition in the market. The Fertilizer Bill does not provide how financial information provided will be protected by the Commission or even how it will be kept. It is strongly recommended that sub-clauses 29(20) to (23) be excluded from the Fertilizer Bill. The numbering of the clauses should also be revised. The reference to incorrect sub-clauses throughout Clause 29 is confusing.

(f) Packaging and Labeling

Under the current Fertilizer Regulations, fertilizer containers should be duly labeled in English showing the fertilizer specifications, and failure to do so constitutes a punishable offence.⁶⁷ This provision is not descriptive enough to provide consumers with complete information about the fertilizer product. The Fertilizer Policy prioritizes truthful labeling, recognizing that the lack of or inaccurate labeling can deny farmers knowledge about the appropriateness of the fertilizer. Malawi's National Fertilizer Policy does not make a specific policy statement on labeling and packaging, but the Policy's implementation plan includes an initiative to improve truth-in-labelling for fertilizer products. The Fertilizer Act should require that fertilizer is packed and labeled in accordance with relevant provisions in the Regulations to the Act.

The Fertilizer Bill adequately incorporates this good regulatory practice under Clause 26, which requires fertilizer to be labeled in tandem with the Regulations, and Clause 33 declares misbranding of fertilizer, including improper labeling, an offence.

⁶⁶ Clause 29(7)(a) of the Fertilizer Bill.

⁶⁷ Regulation 6 of the Fertilizer Regulations.



3. Environmental Protection and Sustainability

(a) Proper Storage and Application of Fertilizer

Under Policy Priority Area 7 on sustainability and environmental management, the Fertilizer Policy notes that development of Malawi's fertilizer industry should take place in a responsible and sustainable manner, without causing undue harm to the environment and natural resource base. The Fertilizer Act should prohibit the trade, use, storage, discharge, release, and application of any fertilizer in a manner likely to cause any adverse effect to human health or the environment. The same provision could require application of fertilizer in accordance with fertilizer standards that align with international standards and can be described under the Regulations to the Act and/or in separate guidelines to be developed by the NFRC. Clause 34 of the Fertilizer Bill prohibits trade in fertilizer that contains ingredients harmful to plant, animal, and human health, and the environment, but it does not include the detail noted in the policy.

Recommendation on Environmental Protection and Sustainability

The provision should be revised to include the prohibition of acts that amount to improper use, storage, or disposal of fertilizer. In some countries, e.g., Tanzania, the legal framework also describes how fertilizer should be stored. This could be adopted as a good regulatory practice.

4. Transparency and Due Process

(a) Appeals

Given that many of the provisions in the National Fertilizer Policy involve administrative procedures where public entities have the power to determine who can participate in the fertilizer market and under which conditions, the right of market actors to appeal these decisions is critical. While the right to appeal is not prioritized or mentioned anywhere in the Fertilizer Policy, the Fertilizer Act should incorporate this good practice and designate a competent authority to handle appeals, with the regulations prescribing the procedural rules to be followed.

The Fertilizer Bill includes separate clauses on making appeals. Under Clause 23, a person aggrieved with the Commission's decision to cancel a certificate of registration of fertilizer can appeal to the Minister responsible for agriculture, and if dissatisfied, a further appeal can be made to the High Court. The provision does not, however, include where appeals can be lodged if an applicant is dissatisfied with any other decisions the Commission makes during the process of determining the grant of certificate of fertilizer registration, including the denial of the grant or renewal of the certificate.

Where a person is aggrieved with the Commission's decision to seize fertilizer lots that are found not to be in compliance with the Act and Regulations, Clause 39 of the Fertilizer Bill provides that an appeal can be lodged with the Registrar, who under Clause 15 is also the Director General of



the NFRC. This provision is inherently ambiguous and goes against established good practices on transparency and due process, in that it allows the Director General, who is part of the Commission, to hear appeals of the Commission's decisions.

Clause 41 of the Fertilizer Bill on jurisdiction provides that any complaints arising from the fertilizer law may be determined by the Resident Magistrate. Notably though, the Resident Magistrates' jurisdiction is limited to where the subject matter does not exceed MWK 2,000,000 (approximately USD 2,500).⁶⁸ This limited jurisdiction will affect the Resident Magistrates' hearing of cases where the fertilizer in question exceeds the stated amount. The reasonable court of redress would be the High Court, which has "unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law."⁶⁹

Recommendation on Appeals

While the Fertilizer Bill embraces the issue of appeals as a good regulatory practice, all relevant clauses on due process are either ambiguous or inadequate. These provisions could be removed and replaced with a separate section on appeals that provides that for any person aggrieved by the decision made by the Commission regarding the implementation of the Act can appeal to the Minister responsible for agriculture within a prescribed time (preferably thirty days) from receipt of such decision. The appeal should be required to be in writing and clearly articulate the grounds of appeal. After hearing and considering an appeal, the minister may: (a) confirm, set aside or vary the relevant decision of the Commission and (b) order the Director General to execute the decision in connection therewith. The procedures for appeals under the Act should be prescribed under the Regulations.

When a party contests the decision of the Minister, a further appeal may be lodged to the High Court of Malawi. The decision of the High Court shall be final and conclusive on the matter.

(b) Confidentiality

The information shared with the fertilizer regulatory authorities during licensing and registration is sometimes business confidential information, the protection of which is critical to fair competition in the fertilizer sector. While this principle is completely missing in the Fertilizer Policy, the Fertilizer Act could guarantee confidentiality of key business information provided by applicants during the licensing and registration processes.

Under Clause 24 of the Fertilizer Bill, the Commission will treat as confidential any information it receives during the application for a certificate for registration of fertilizer, except where it is ordered to release such information by a competent court of law or the minister responsible for agriculture.

⁶⁸ Section 39(1)(a) of the Courts Act.

⁶⁹ Section 108(1) of the Constitution of Malawi (as amended). Available at: https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en.

Recommendation on Confidentiality

Clause 24 of the Fertilizer Bill covers confidentiality but only applies to business information received during applications for registration of fertilizer. This provision should be expanded to apply to all business information received under the Act, including under applications for licenses, and especially relating to the requirements to provide financial records to the Commission.

5. Offences and Penalties

As a good regulatory practice aimed at effective implementation of fertilizer regulatory regimes, the Fertilizer Act should clearly state which actions can result in penalties under the Act and Regulations, along with any options for compensation under civil litigation in case of loss or damage. The Fertilizer Policy make no policy statement on punitive measures for violations. Under Clause 41 of the Fertilizer Bill, trading without a certificate of fertilizer registration and sale of fertilizer is inconsistent with the provisions of the Act and is considered a general offence. Other offences under the Bill include trading without a license (Clause 29(2)), failure to submit annual financial records to the Commission without cause (Clause 29(22)), misbranding (Clause 33), and trade in nutrient-deficient fertilizer (Clause 38).

Recommendation on Offences and Penalties

For clarity and ease of reference, all acts that amount to violations under the Fertilizer Act should be listed under Clause 41.

The Fertilizer Bill should include an option for civil litigation to enable recovery of damages where one incurs a loss as a result of breach of the provisions of the Act or Regulations.

6. Establishment of the Fertilizer Fund

The Fertilizer Policy provides for the establishment of a fertilizer fund to be managed by the NFRC, which shall be comprised of fees from licenses, inspections, and fines. In tandem with the Fertilizer Policy, the Fertilizer Act should include provisions creating the Fertilizer Fund. To avoid mismanagement of the fund, the Act should include provisions on how the fund should be managed, including a provision on maintaining proper records and books of account with respect to all income and expenses, in accordance with International Accounting Standards; auditing of the books of account at the end of every financial year by the Auditor General; adoption and certification of the audited books of account by the Fertilizer Board; and submission to the Minister responsible for agriculture of a copy of the audited reports and the certification from the Fertilizer Board.

Clause 20 of the Fertilizer Bill establishes sources of funds for the Commission and stipulates how they are to be managed in tandem with the Fertilizer Policy.

Other Recommendations

Sub-clauses 31(2) to (13) of the Fertilizer Bill are repetitive of 23(6) to (8). All of these clauses should be removed from the Bill in consideration of the recommendation on appeals noted above.



Clause 45(1)(c) of the Fertilizer Bill provides for the Minister to develop regulations under the Act on fertilizer pricing. It is recommended that this provision be removed, as price setting can distort the market and negatively impact private sector engagement in the sector, contrary to the National Fertilizer Policy's objectives.

Conclusion

Malawi's efforts to reform its existing fertilizer legal and regulatory framework, replacing outdated rules and regulations with a more up-to-date system that addresses current fertilizer sector issues, is a commendable development. However in creating and revising the policy and legal framework, international, regional and national good practices must be considered. This will ensure establishment of an enabling environment conducive to development of the fertilizer sector and fertilizer trade and will ease availability, access, and affordability of fertilizer, especially for smallholder farmers. The Fertilizer Act, which is currently under development, should be aligned with the Fertilizer Policy, which embodies guiding principles for the sector. In particular, in keeping with the objectives of the Fertilizer Policy, the Fertilizer Act should not include regulatory measures that are so stringent that they curtail private sector engagement and investment in the sector. The recommendations and options identified in this assessment are designed to help ensure alignment of the fertilizer law with key policy statements under Malawi's Fertilizer Policy and relevant good practices.