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## Congress, Give Renewable Energy a Fair Fight: Passage of the Master Limited Partnerships Parity Act Would Give Renewable Energy the Financial Footing Needed to Independently Succeed

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CONGRESS, GIVE RENEWABLE ENERGY A FAIR FIGHT:  
PASSAGE OF THE MASTER LIMITED PARTNERSHIPS PARITY  
ACT WOULD GIVE RENEWABLE ENERGY THE FINANCIAL  
FOOTING NEEDED TO INDEPENDENTLY SUCCEED

I. INTRODUCTION

From recent stories in the national media, it may seem like the federal government gives renewable energy all its focus and resources.<sup>1</sup> However, beneath the surface lies the real truth: Master Limited Partnerships (MLPs) provide fossil fuels more advantages than any incentives the federal government offers renewables.<sup>2</sup> For example, in 2014, Royal Dutch Shell (Shell) founded Shell Midstream Partners (Midstream), a Texas-based subsidiary of the global petroleum giant, to operate and own oil pipelines around the United States (U.S.).<sup>3</sup> Shell set up Midstream as an MLP for the structure's financial advantages.<sup>4</sup>

MLPs are a specific subset of the U.S. Tax Code that provide significant tax benefits to fossil fuel companies.<sup>5</sup> As a result of these tax benefits, fossil fuel companies pay substantially less income taxes than traditional publically-traded corporations.<sup>6</sup> Under MLPs, fossil fuel companies only pay income taxes at the shareholder level, whereas traditional corporations must pay taxes at the

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1. See Ben Wolfgang, *Obama Vows U.S. Will Triple Renewable Energy by 2030*, WASH. POST (June 30, 2015), <http://www.washingtonpost.com/news/2015/jun/30/obama-vows-us-will-triple-renewable-energy-2030/> (discussing US's broad renewable energy commitment).

2. For a discussion of why Master Limited Partnerships (MLP) are more effective than any of the federal government's current renewable energy incentives, see *infra* notes 18-32 and accompanying text.

3. See Sonali Basak, *Shell Midstream Climbs in Best Energy Trading Debut*, BLOOMBERG BUSINESS, <http://www.bloomberg.com/news/articles/2014-10-28/shell-midstream-raises-920-million-in-u-s-pipeline-ipo> (last updated Oct. 29, 2014, 4:43 PM) (discussing Shell Midstream's partnership with Europe's biggest oil company). Royal Dutch Shell currently owns seventy-one percent of the Houston-based Midstream. *Id.*

4. See *id.* (describing Shell Midstream's MLP and its favorable treatment under Internal Revenue Code (IRC)).

5. See *id.* (providing that MLPs offer fewer taxes and higher cash returns to shareholders).

6. See *Benefits of MLPs*, STOCKS 500, <http://news.morningstar.com/classroom2/course.asp?docId=145579&page=4&CN=sample> (last visited Sept. 23, 2015) (discussing how MLPs pay substantially less in income taxes than corporations).

150 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

entity and individual shareholder level (double taxation).<sup>7</sup> Aside from tax benefits, MLPs can also use national stock exchanges to fundraise like any other equity security.<sup>8</sup>

Shell's MLP, Midstream, took advantage of all these MLP benefits and raised \$920 million at its initial public offering.<sup>9</sup> The company has subsequently raised even more capital, with its February 2015 market capitalization standing around \$5.4 billion.<sup>10</sup> Midstream uses these investor funds to finance crude oil pipelines around the country.<sup>11</sup> Financial firms analyzing Midstream currently recommend that investors buy company shares because Midstream is well positioned in a strong oil and gas industry.<sup>12</sup> Moreover, because of Midstream's MLP structure, it is able to constantly distribute cash earnings to shareholders.<sup>13</sup> While not all MLPs are thriving, Midstream demonstrates the capabilities of what an MLP can potentially accomplish under the right circumstances.<sup>14</sup>

Renewable energy development companies—enterprises that bring together customers and renewable technology producers—do not have the same financial fortune as Midstream, and Congress refuses to help.<sup>15</sup> In enacting favorable tax treatment for fossil fuel

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7. *See id.* (explaining corporate double tax problem and how MLPs avoid it).

8. *See id.* (explaining reasons why MLPs have fundraising advantages). For example, MLPs provide generally high rates of return, predictable cash flows, and less in taxes, creating an attractive proposition for interested investors. *See id.*

9. *See* Basak, *supra* note 3 (providing initial public offering amount for Midstream).

10. *See Shell Midstream Partners L.P.*, YAHOO FIN. (Feb. 20, 2015), <http://finance.yahoo.com/q?s=SHLX> [hereinafter *Shell Midstream*] (providing Midstream's financial and investment statistics). As of February 20, 2015, Midstream had a market capitalization of \$5.6 billion. *Id.* Market capitalization is the number of shares outstanding multiplied by the price per share. *See Market Capitalization*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/marketcapitalization.asp> (last visited Sept. 24, 2015).

11. *See Shell Midstream supra* note 10 (explaining Shell Midstream's operations).

12. *See Shell Midstream Partners L.P.*, YAHOO FIN., <http://finance.yahoo.com/q/ao?s=SHLX> (last updated Oct. 2, 2015, 4:04 PM) (recommending investors buy MLP shares). On a scale of one to five, where one indicates "strong buy" and five indicates "strong sell," the recommendation summary was 2.2 in October 2015, which supports buying, rather than selling, shares. *See id.*

13. *See Shell Midstream Partners L.P.*, NASDAQ, <http://www.nasdaq.com/symbol/shlx/recommendations> (last updated Oct. 2, 2015) (supporting "buy" recommendation of Shell Midstream as of October 4, 2015).

14. *See id.* (providing successful statistics regarding Midstream).

15. *See* Robert Rapier, *No Parity for Solar as Congress Slumbers*, INVESTING DAILY (Feb. 18, 2014), <http://www.investingdaily.com/19495/no-parity-for-solar-as-congress-slumbers-2/> (highlighting Congress's failure to pass proposed MLP bill, giving renewables similar financial advantages to fossil fuels).

companies, Congress specifically neglected to extend the same benefits to renewable energy companies.<sup>16</sup> As a result, renewable energy companies have less financial capital options and inherently higher costs of capital than fossil fuel companies.<sup>17</sup> For example, a solar company looking to fundraise in a similar capacity to Midstream may do so either privately or through public funding.<sup>18</sup> The solar company, however, must use a corporate structure in its fundraising efforts, rather than an MLP.<sup>19</sup> This is less advantageous than using an MLP because the solar company must pay the corporate double tax.<sup>20</sup> The corporate double tax nomenclature is derived from the federal government's requirement that all corporations pay taxes at the entity level as well as the individual shareholder level.<sup>21</sup> By contrast, MLPs save tax dollars by only paying taxes at the individual shareholder level.<sup>22</sup>

Since solar companies must use the corporate structure to raise public capital, private fundraising has become a popular alternative and can cost significantly less.<sup>23</sup> For example, Sun Run, a national leader in rooftop solar services, opts to remain private because its

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16. See Peter Mantius, *Fossil Fuels Get Huge Master Limited Partnership Tax Breaks – “Green” Energy Shut Out*, DC BUREAU (Sept. 22, 2014), <http://www.dcbureau.org/201409229967/natural-resources-news-service/multi-billion-dollar-tax-rules-favor-fossil-fuels-hurt-green-energy-competitors.html> (discussing how renewable energy was neglected when effective lobbying gave some industries continued use of MLPs).

17. See *id.* (discussing how current federal renewable energy policy restricts renewable projects' capital access). Extending MLPs to renewables would also give renewables substantially more capital access at much cheaper rates. *Id.*

18. See Felix Mormann & Dan Reicher, *How to Make Renewable Energy Competitive*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/02/opinion/how-to-make-renewable-energy-competitive.html?pagewanted=2> [hereinafter *Energy Competitive*] (discussing renewables' limited fundraising opportunities). Currently, only a few deep-pocketed companies invest in renewables. See Joel Kirkland, *Cash-Rich Companies Begin to Make Renewable Energy Investments*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/cwire/2011/08/18/18climatewire-cash-rich-companies-begin-to-make-renewable-e-3023.html>. Private investments occur behind the scenes, and renewable developers cannot always rely on them. *Id.* Public investing, conversely, occurs on national exchanges through a corporation or fossil-fuel-related MLP and has more reliable and eligible investors. *Id.*

19. See *Energy Competitive*, *supra* note 18 (discussing how federal law excludes MLPs from renewables).

20. See *Benefits of MLPs*, *supra* note 6 (explaining negative tax consequences of traditional corporations).

21. See *id.* (explaining corporation's expensive double-tax problem).

22. See *id.* (discussing how MLPs save organizations from paying taxes).

23. See Eric Wesoff, *CEO Lynn Jurich on the Future of Sunrun and Residential Solar*, Greentech Media (Aug. 27, 2014), <http://www.greentechmedia.com/articles/read/CEO-Lynn-Jurich-on-the-Future-of-Sunrun-and-Residential-Solar> (discussing how Sun Run's decision to privately raise capital is more efficient and “offers a lower weighted average cost of capital” than going public).

152 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

CEO believes it offers better access to cheaper costs of capital than if it was a public entity.<sup>24</sup>

Solar companies can still look to the public markets to raise capital, but they do so at a disadvantage as compared to fossil fuel companies.<sup>25</sup> Consider the solar energy giant, SolarCity.<sup>26</sup> SolarCity is a publically traded corporation listed on national stock exchanges with a similar market capitalization to Midstream.<sup>27</sup> SolarCity's investment profile, however, differs significantly from Midstream's profile.<sup>28</sup> SolarCity does not pay any cash dividends on its stock and must pay taxes on all yearly net income.<sup>29</sup> Midstream, conversely, constantly pays cash dividends to its investors and pays no income taxes on its entity profits.<sup>30</sup> Additionally, Midstream pays substantially less in income tax each year, leaving more cash to distribute to its shareholders.<sup>31</sup> Congress's preferential treatment of fossil fuel companies versus renewable energy companies encourages the U.S. to remain addicted to fossil fuels.<sup>32</sup>

This Comment will demonstrate how Congress can do more to provide renewables an equal opportunity to compete with fossil fu-

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24. *See id.* (discussing Sun Run's strategic decision to stick with private capital over public capital).

25. *See Energy Competitive, supra* note 18 (explaining renewable energy's clear disadvantage in public capital markets).

26. *See SolarCity Corporation, YAHOO FIN.*, <http://finance.yahoo.com/q?s=SCTY> (last updated Oct.2, 2015, 4:00 PM) (providing SolarCity's financial statistics).

27. *See id.* (highlighting SolarCity's \$4.51 billion market capitalization as well as displaying SolarCity's stock price in October 2015).

28. *See id.* (providing no dividend payment for SolarCity unlike Midstream); *see also Shell Midstream, supra* note 10 (detailing Shell Midstream's financial information). Shell Midstream lists dividend payment information as well as a price-earnings ratio because Midstream's MLP owners have dividends distributed and earnings from their MLP investment. *See id.* SolarCity, conversely, pays nothing to investors and has no dividend payment information or price-earnings ratio because the company makes no payments on the stock. *See SolarCity Corporation, supra* note 26. Investors buying SolarCity stock can only realize returns on their investment by holding the stock and subsequently selling it at a higher price. *Id.*

29. *See SolarCity Corporation, supra* note 26 (providing no dividend payment information). For a discussion of why traditional corporations like SolarCity pay entity-level taxes, while MLPs like Midstream do not, *see infra* notes 88-93 and accompanying text.

30. *See Master Limited Partnerships - 101, LATHAM & WATKINS LLP*, <https://www.lw.com/MLP-Portal/101#economic-structure> (last visited Sept. 24, 2015) (discussing how MLPs pay out cash dividends and are tax-free pass-through entities).

31. *See id.* (explaining how MLPs pay no entity-level income taxes, affording MLPs more cash flow to distribute back to investors). As the MLP 101 guide highlights, MLPs focus on distributing cash to investors. *Id.* Constant cash back to investors increases the MLP's market valuation. *Id.*

32. *See Energy Competitive, supra* note 18 (discussing how Congress has encouraged traditional energy development through MLPs). Congress could do the same with renewables. *Id.*

els, as well as highlight the potential benefits the U.S. could reap by extending the MLP structure to renewable energy.<sup>33</sup> Part II of this Comment provides the relevant facts to understanding why an MLP structure can be so financially beneficial for companies utilizing them.<sup>34</sup> Part III of this Comment provides a history of the MLP structure and the current condition of investing in renewable energy projects.<sup>35</sup> Part IV of this Comment analyzes the federal government's support of renewable energy and describes opportunities for improvement.<sup>36</sup> Finally, Part V assesses the potential impacts the MLP bill, if the bill passes Congress, could have on implementing renewable energy at the state level.<sup>37</sup>

## II. BUSINESS ENTITIES

In order to truly understand the benefits of the MLP structure, it is important to have a basic understanding of the different business structures available and how these structures work in comparison to each other.<sup>38</sup> For example, corporations can raise significantly more money through public markets than a sole proprietorship, but corporations also pay more in taxes and fees.<sup>39</sup> This section provides the background knowledge needed to understand the benefits of an MLP structure by discussing the different business structures, highlighting the various ways business structures pay taxes and fundraise, and examining how MLPs uniquely blend the beneficial elements of multiple different business entities.<sup>40</sup>

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33. For a discussion of the potential benefits the U.S. could realize from extending MLPs to renewables, see *infra* notes 164-173 and accompanying text.

34. For a discussion on how renewables using MLPs could provide beneficial and foundational knowledge in business structures, see *infra* notes 38-93 and accompanying text.

35. For a discussion of the relevant historical background information that affects MLP structure, see *infra* notes 99-163 and accompanying text.

36. For an analysis of why Congress should extend MLPs to renewables, see *infra* notes 223-258 and accompanying text.

37. For a prediction on the potential impacts MLPs could have on renewable energy capacity implementation, see *infra* notes 259-274 and accompanying text.

38. See Beth Laurence, *Learn About Business Ownership Structures*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/learn-about-business-ownership-structures-29785.html> (last visited Feb. 25, 2015) [hereinafter *Business Ownership Structures*] (discussing different available organizational structures for business).

39. See *id.* (explaining how corporations are costlier to administer). Even though corporations are costlier to administer, they protect investors from liability, ensuring that investors are not personally liable for the torts, liabilities, or debts of the business. *Id.*

40. For a discussion of the different business structures and the different ways businesses fundraise and pay taxes, see *infra* notes 41-79 and accompanying text.

### A. Non-MLP Entity Structures

When a business forms, its owners generally choose among a variation of the following four business entities: the sole proprietorship, the partnership, the limited partnership, and the corporation.<sup>41</sup> Each form of business entity has its own advantages and disadvantages, impacting all significant business decisions.<sup>42</sup>

Sole proprietorships exist solely through the single person who starts, owns, and operates the business.<sup>43</sup> Sole proprietorships have no permanence because they die with the individual who owns the business.<sup>44</sup> Unlike sole proprietorships, partnerships form when two or more persons conduct business together as co-owners for profit.<sup>45</sup> Partners set forth their specified ownership interests in an initial partnership agreement.<sup>46</sup> Both partnerships and sole proprietorships pass all business tort and contract liability to their owners, making them risky forms of business.<sup>47</sup>

Limited partnerships help reduce liability for all owners.<sup>48</sup> Limited partnerships are similar to partnerships in that they must have at least one general partner who is liable for contract and tort damages.<sup>49</sup> Limited partnerships are unique, however, because they use outside investors.<sup>50</sup> Limited partnerships allow outside investors to invest in the partnership without subjecting outside inves-

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41. See *Business Ownership Structures*, *supra* note 38 (discussing different available organizational structures). While the four organizational business structures share their similarities, some are more costly and difficult to run. *Id.* Businesses take these factors into account when evaluating their business structures. *Id.*

42. See *id.* (discussing variations of different business organizations and potential impacts on business decisions).

43. See Joshua Levenson, *Sole Proprietorship Basics*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/sole-proprietorship-basics-29694.html> (last visited Feb. 25, 2015) (discussing sole proprietorship basic information and differentiation from other types of organizational structures).

44. See *id.* (discussing how sole proprietors are sole owners of the business).

45. See *Partnership*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/partnership> (last visited Feb. 25, 2015) (providing partnership's basic definition).

46. See *id.* (explaining partnership agreement's basic information).

47. See Beth Laurence, *Partnership Basics*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/partnership-basics-30072.html> (last visited Feb. 25, 2015) [hereinafter *Partnership Basics*] (discussing partnerships potential for tort and contract liability).

48. See *Business Ownership Structures*, *supra* note 38 (discussing how limited partnerships and corporations reduce outside investors' potential liability).

49. See *id.* (providing similarities between limited and general partnerships); see also *Partnership Basics*, *supra* note 47 (discussing how limited partnerships' general partner has general partnership liability).

50. See *Business Ownership Structures*, *supra* note 38 (explaining how limited partnerships allow outside investment through limitation of liability).

tors to general partnership liability.<sup>51</sup> Limited partnerships guarantee that partners are liable only for the financial assets contributed to the business.<sup>52</sup> Limited partners thus do not face any other type of liability.<sup>53</sup>

Corporations also help reduce liability to all owners.<sup>54</sup> They differ from all of the previous entities described above, however, because their owners are completely insulated from any personal liability.<sup>55</sup> All of the corporation's debts and torts live and die with the corporation, allowing the corporation to exist separately from its owners.<sup>56</sup>

## B. Taxes and Fundraising

Two important features of any corporate entity are how the entity pays taxes and how the entity acquires capital.<sup>57</sup> In a sole proprietorship, the individual owner often funds the business alone.<sup>58</sup> Outside investors generally avoid investing in a sole proprietorship because they can be held personally liable for the business's contract and tort liability.<sup>59</sup> Partnerships function similarly.<sup>60</sup> Partnerships raise funds directly from their owners.<sup>61</sup> Outside investment in a partnership is highly unlikely because investors would subject themselves to personal liability, similar to sole proprietorships.<sup>62</sup>

51. *See id.* (emphasizing limited partners' limited liability).

52. *See* Peri Pakroo, *Limited Partnerships and Limited Liability Partnerships*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/limited-partnerships-limited-liability-partnerships-29748.html> (last visited July 28, 2015) (explaining that limited partners can only lose their financial investment). Limited partners face no contract or tort liability of the business. *Id.*

53. *See id.* (detailing how limited partners do not have to pay off debts incurred by the business).

54. *See* Beth Laurence, *Corporation Basics*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/corporation-basics-29867.html> (last visited Feb. 25, 2015) (providing how corporations insulate owners from business debts).

55. *See id.* (discussing business owners' limited liability and how corporations completely separate business from ownership).

56. *See id.* (explaining unique, infinite life of a corporation).

57. *See Business Ownership Structures*, *supra* note 38 (explaining corporation's different ways of paying taxes); *see also Energy Competitive*, *supra* note 18 (providing different corporate structures' fundraising advantages).

58. *See Business Ownership Structures*, *supra* note 38 (discussing how sole proprietorships exist through sole owners).

59. *See id.* (providing that sole proprietors are personally liable for all business debts and liabilities).

60. *See* Pakroo, *supra* note 52 (discussing how general partnership partners are personally liable for all business debts and liabilities).

61. *See id.* (comparing ways limited partnerships and partnerships raise business capital).

62. *See id.* (differentiating between general partners' personal liability and limited partners' limited liability).



156 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

Limited partnerships and corporations solve the outside investment liability problem by allowing outside investors to put money into an entity while limiting any liability to the investor's total financial contribution to the business.<sup>63</sup> Investors in limited partnerships and corporations are more willing to invest because their potential risk is limited to the amount of money invested, whereas partnership and sole proprietorship investors could be at risk for all the business's liabilities.<sup>64</sup> Corporate management also prefers limited partnerships and corporations for large, fast-growing companies because these business structures provide broad access to capital, thereby allowing companies to rapidly expand.<sup>65</sup>

The taxation of these different business entities also motivates owners' decisions about which type of business structure to use.<sup>66</sup> Sole proprietorships accrue all profits and losses directly to their owners and the owners pay taxes on these profits at their individual tax rate.<sup>67</sup> Partnerships and limited partnerships function the same way.<sup>68</sup> Profits and losses flow through to the partners according to their proportionate ownership interests and partners pay income taxes on earnings at their personal tax rate.<sup>69</sup> Sole proprietorships, partnerships, and limited partnerships do not pay any entity-level tax.<sup>70</sup>

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63. See *Business Ownership Structures*, *supra* note 38 (explaining how limited partnerships and corporations separate purely financial investors from personally guaranteeing business debts and liabilities). This separation of ownership allows for much more capital and outside investment because purely financial owners cannot be held personally liable for any debts or liabilities of the business. *Id.*

64. See *id.* (elaborating on general partners' personal responsibility, as compared to limited partners and corporate investor's limited liability).

65. See Beth Laurence, *Choosing the Best Ownership Structure for Your Business*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/business-ownership-structure-choose-best-29618.html> (last visited July 28, 2015) [hereinafter *Best Ownership Structure*] (emphasizing how corporations and limited partnerships make raising capital easier than other business structures).

66. See *id.* (highlighting how business owners should make income tax considerations before determining which type of corporate entity to use).

67. See *id.* (explaining how sole proprietorships are pass-through entities).

68. See *id.* (detailing how partnerships and limited partnerships are also pass-through entities).

69. See *id.* (detailing how profits and losses flow through to individual owners). Furthermore, individual owners report these earnings or losses in their personal income tax returns. *Id.*

70. See *Best Ownership Structure*, *supra* note 65 (explaining pass-through entities). Pass-through entities pay no corporate taxes because all profits and losses pass through to individual investors. *Id.* Individual investors pay taxes on these profits in accordance with their individual tax rates. *Id.*

Corporations are in a less fortunate position.<sup>71</sup> Corporations instead pay multiple levels of taxes.<sup>72</sup> Specifically, they pay taxes at the entity level and at the individual shareholder level on any earnings the corporation distributes.<sup>73</sup> In essence, corporations may pay entity level corporate taxes as high as thirty-five percent in the U.S.<sup>74</sup> For example, if Wal-Mart earns one billion dollars in profits in 2015, then Wal-Mart must pay \$350 million in federal income taxes.<sup>75</sup>

After corporations pay entity-level taxes, they often make cash distributions, called dividends, to shareholders to provide investors some return on investment.<sup>76</sup> Shareholders receiving dividends must pay an additional fifteen percent tax on the dividends received; therefore, shareholders pay a second tax on the company's profits after the corporation has already paid federal entity-level taxes.<sup>77</sup> In the Wal-Mart example above, Wal-Mart could distribute the \$650 million of after-tax profit to its shareholders, and the shareholders would have to pay an additional fifteen percent on their received share.<sup>78</sup> In sum, corporations are the only entities that face this expensive, double-tax burden.<sup>79</sup>

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71. *See id.* (describing how corporations pay entity-level taxes and taxes on dividends received).

72. *See id.* (discussing expensive administrative burden on corporations); *see also* William McBride, *America's Shrinking Corporate Sector*, TAX FOUND. (Jan. 6, 2015), <http://taxfoundation.org/article/america-s-shrinking-corporate-sector> (discussing U.S. companies' reluctance to use traditional corporations).

73. *See Best Ownership Structure*, *supra* note 65 (discussing corporation's multiple layers of taxes).

74. *See Corporate Tax Rates Table*, KPMG (2014), <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html> (last visited Sept. 23, 2015) (providing U.S. corporate tax rates).

75. *See id.* (citing U.S. corporate tax rate at thirty-five percent). The highest marginal tax rate for corporations is thirty-five percent. *Id.*

76. *See* Beth Laurence, *How Corporations Are Taxed*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/how-corporations-are-taxed-30157.html> (last visited Feb. 25, 2015) (discussing corporations' different levels of taxes, including dividend payments to shareholders).

77. *See id.* (discussing corporate double taxation problem); *see also Tax Treatment of Dividend Income*, WELLS FARGO ADVISORS, <https://www.wellsfargoadvisors.com/market-economy/financial-articles/investing/dividend-income-tax.htm> (last visited Sept. 24, 2015) (providing qualified dividends tax range between ten and twenty percent). Qualified dividends are U.S. corporate dividends paid on common or preferred stock. *Id.* For qualified dividends, individuals pay reduced capital gains tax rates. *Id.* The article's fifteen percent mark is a simple average of the reduced capital gains tax rates. *Id.*

78. *See Tax Treatment of Dividend Income*, *supra* note 77 (discussing dividend tax rate).

79. *See Best Ownership Structure*, *supra* note 65 (proclaiming how only corporations face burdensome double-taxation problem).

158 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

### C. MLP Structure

MLPs blend the advantages of a partnership, limited partnership, and corporation into one distinct corporate entity.<sup>80</sup> MLPs incorporate some elements of partnerships because they require a general partner to own at least two percent of the business and to be personally liable for its contract and tort liability.<sup>81</sup> MLPs also function like limited partnerships, however, because they allow limited partners to invest money into the business, with personal liability limited to each limited partner's financial investment.<sup>82</sup> Finally, MLPs have the fundraising advantages of traditional public corporations because they trade on national exchanges.<sup>83</sup>

MLPs are different from traditional limited partnerships because traditional limited partnerships do not have access to all of the capital available on national exchanges.<sup>84</sup> Traditional limited partnerships have much smaller investor pools, thus making capital more difficult to acquire.<sup>85</sup> Conversely, MLPs have a much broader potential investor pool because they can raise money from any investor willing to invest.<sup>86</sup> Additionally, MLPs also make investors more comfortable investing because investors can track their capital performance on national exchanges, whereas they cannot in a typical private investment.<sup>87</sup>

MLPs do not pay entity-level taxes.<sup>88</sup> MLPs are only required to pay taxes on earnings at the individual investor level, like a part-

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80. See David Feldman & Edward Settle, *Master Limited Partnerships and Real Estate Investment Trusts: Opportunities and Potential Complications for Renewable Energy*, NAT'L RENEWABLE ENERGY LAB., 5 (Nov. 2013), available at <http://www.nrel.gov/docs/fy14osti/60413.pdf> (discussing MLPs generally and their main advantages).

81. See *Master Limited Partnerships 101*, *supra* note 30 (discussing basics of MLP structure).

82. See *id.* (highlighting MLP investors' limited liability).

83. See *id.* (explaining MLP's fundraising advantages).

84. See Pakroo, *supra* note 52 (discussing general partners' personal liability for all business debts and liabilities).

85. See *id.* (explaining greater potential for liability in general partnerships). Since all general partners must pay their share of the partnership's debts and liabilities, independent financial investors typically stay away from investing in general partnerships. *Id.*

86. See *Master Limited Partnerships 101*, *supra* note 30 (defining MLPs and stating they must be publically traded).

87. See *id.* (explaining that MLPs must be publically traded). Because MLPs must be publically traded, they are listed on national exchanges making it easier for investors to keep track of their earnings. *Id.*

88. See *id.* (providing how MLPs are taxed as pass-through entities). "[T]his tax savings contributes to the cost of capital advantage enjoyed by MLPs over similarly situated corporations." *Id.*

nership or limited partnership.<sup>89</sup> Thus, MLPs avoid the expensive double-taxation that burdens corporations.<sup>90</sup> This tax savings is a subtle advantage to MLPs that compounds over time.<sup>91</sup> By avoiding entity-level taxes, MLPs can retain more capital than corporations and distribute more capital to investors.<sup>92</sup> Investors prefer investments which provide a high rate of return, thus avoiding entity-level taxation gives MLPs a strong fundraising advantage over corporations.<sup>93</sup>

### III. BACKGROUND

To understand why MLPs trump any current federal renewable financial incentives, it is helpful to understand their history in the U.S. and why Congress has limited and continues to limit their formation.<sup>94</sup> This section explains how Congress's current system works, how the current system has unintended negative consequences, and how Congress can remedy the situation by extending MLPs to renewables.<sup>95</sup>

#### A. MLP Structure in the U.S.

Arguably, many American businesses would take advantage of the preferential MLP structure if given the opportunity.<sup>96</sup> Unfortunately, the significant financial advantages of the MLP structure are only offered to a limited number of congressionally-preferred busi-

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89. *See id.* (reiterating that MLP investors only pay taxes at their personal levels).

90. *See id.* (emphasizing advantage of MLPs over other corporate entities).

91. *See Master Limited Partnerships 101, supra* note 30 (discussing robust market for MLPs because they avoid entity-level taxes).

92. *See id.* (emphasizing that investors like MLPs because of their unusually high returns).

93. *See Master Limited Partnerships 101, supra* note 30 (highlighting that "cash is king" in MLPs, allowing them to thrive because they return money to investors).

94. *See id.* (discussing history of MLPs in U.S.).

95. *See id.* (explaining how MLPs operate under current federal law). *See also Energy Competitive, supra* note 18 (focusing on negative effects of Congress's current tax regime and how Congress can easily remedy renewables funding problems).

96. *See Master Limited Partnerships 101, supra* note 30 (discussing advantages of MLPs that make them appealing investments). Many businesses used MLPs before Congress restricted their use. *Id.* Considering MLPs' substantial tax advantages, there is little reason to think that things would work out any differently if Congress once again allows for broad MLP usage. *Id.*

160 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

nesses structures.<sup>97</sup> Since the rise in popularity of MLPs in the early 1980s, Congress has substantially limited their use.<sup>98</sup>

In 1981, Apache Oil (Apache) created the first MLP by combining thirty-three oil and gas limited partnerships into one large partnership.<sup>99</sup> Apache's new corporate structure raised capital like a traditional corporation; Apache, however, only paid taxes at the individual investor level.<sup>100</sup> Thus, Apache's newly formed MLP structure revealed the substantial tax savings MLPs offer to the investment community.<sup>101</sup>

On a dollar-per-dollar basis, MLP tax savings continually prove to be substantial when compared to a traditional corporation.<sup>102</sup> For example, a traditional corporation with ten thousand dollars in pre-tax net income pays over five thousand dollars in entity and shareholder level federal income taxes, while an MLP with the same net income pays only four thousand dollars in federal income taxes.<sup>103</sup> Tax advantages like these allow the MLP to save substantial sums of money each year.<sup>104</sup>

Several financially-savvy companies noticed Apache's MLP structure and chose to follow suit, taking advantage of the tax and fundraising advantages MLPs provide.<sup>105</sup> Many different industries started using MLPs including hotels, amusement parks, and sports teams.<sup>106</sup> In 1987, Congress recognized MLPs could potentially destroy the country's tax base, and subsequently decided to take ac-

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97. *See id.* (discussing how Congress limited MLP use to very select industries including oil, gas, and real estate).

98. *See id.* (detailing Congress's MLP limitation strategy and its impact on MLP formation).

99. *See* Feldman & Settle, *supra* note 80, at 5 (revealing how MLPs emerged in U.S.).

100. *See id.* (highlighting Apache's tax advantages).

101. *See id.* (detailing how Apache's MLP structure inspired other companies to follow suit).

102. *See* Doug Koplow, *Too Big to Ignore: Subsidies to Fossil Fuel Master Limited Partnerships*, OIL CHANGE INT'L, 17 (July 2013), available at [http://priceofoil.org/content/uploads/2013/07/OCL\\_MLP\\_2013.pdf](http://priceofoil.org/content/uploads/2013/07/OCL_MLP_2013.pdf) (charting estimated lost government revenues from companies' MLP usage).

103. *See id.* (providing examples and specific calculations). The calculations in this simple example are based on the current U.S. thirty-five percent corporate tax rate, as well as the favorable fifteen percent long-term capital gains tax rate. *Id.* at 16-17.

104. *See id.* at 17 (demonstrating how MLPs pay less in taxes than corporations).

105. *See* Feldman & Settle, *supra* note 80, at 5 (discussing companies that followed Apache's lead by forming MLPs).

106. *See id.* (highlighting different industries that began to operate as MLPs).

2016] CONGRESS, GIVE RENEWABLE ENERGY A FAIR FIGHT 161

tion.<sup>107</sup> Congress's worry derived from the fact that MLPs' tax savings were readily apparent to nearly all companies.<sup>108</sup>

Consequently, to stop the growth of MLPs, Congress placed substantial limitations on which companies could use them.<sup>109</sup> Despite the limitations, Congress made exceptions for the real estate and fossil fuel industries.<sup>110</sup> Congress passed the MLP limitations and related exceptions as part of its 1987 Omnibus Budget Reconciliation Act.<sup>111</sup> This Act substantially limited MLP usage, made narrow exceptions for powerful industries as a result of effective lobbying, and specifically excluded renewable energy companies from ever using MLPs.<sup>112</sup> At the time, congressional staffers who drafted the 1987 legislation had no idea how beneficial the legislation would be for fossil fuels, and they consequently did not appreciate how the legislation would stifle renewable energy development.<sup>113</sup>

#### B. The Current State of Investing in Renewable Energy Projects

Investing in renewable energy has improved recently due to technological improvements and discounts in production.<sup>114</sup> For example, Chinese-manufactured solar panels have drastically reduced the per watt installation cost of solar energy.<sup>115</sup> In 2011, Chi-

107. See *id.* (discussing Congress's desire to limit MLP usage).

108. See *id.* (describing Congress's worries over corporate tax base erosion).

109. See *Master Limited Partnerships 101*, *supra* note 30 (stating that Congress substantially limited MLP usage in 1987).

110. See Mantius, *supra* note 16 (explaining why Congress extended MLP usage exclusively to real estate and fossil-fuel industries).

111. See Lynn Comer Jones et al., *Master Limited Partnerships: Tax and Investment Issues*, CPA J., <https://www.questia.com/magazine/IP3-1614453661/master-limited-partnerships-tax-and-investment-issues> (last visited Oct. 4, 2015) (providing that Congress limited MLP usage as part of Omnibus Budget Reconciliation Act).

112. See Feldman & Settle, *supra* note 80, at 5 (discussing how Congress's actions disadvantaged renewables).

113. See Zachary R. Mider, *It Pays to Own an Energy Pipeline. Thanks, Tax Code*, BLOOMBERG BUSINESS (Jan. 24, 2013), <http://www.businessweek.com/articles/2013-01-24/it-pays-to-own-an-energy-pipeline-dot-thanks-tax-code> (discussing how MLP bill authors had no idea how important its exception would become for fossil fuels).

114. See Laura Paddison, *10 Things You Should Know About Investment in Renewable Energy*, THE GUARDIAN (July 16, 2014, 2:15 PM), <http://www.theguardian.com/sustainable-business/investment-renewables-10-things-climate-change> (illustrating solar and wind projects' sound economics). After financing methods are considered, solar and wind projects make more practical sense than initially appears. *Id.*

115. See Stephen Lacey, *Top Chinese Manufacturers Will Produce Solar Panels for 42 Cents Per Watt in 2015*, GREENTECH MEDIA (Feb. 4, 2013), <http://www.greentechmedia.com/articles/read/top-chinese-manufacturers-will-produce-solar-panels-for-42-cents-a-wat> (discussing Chinese manufacturers' ability to cut solar panel costs).

162 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

nese solar panels cost about \$1.31 per watt to install; by 2014, the same Chinese solar panels only cost \$0.50 per watt to install.<sup>116</sup> These cost savings can be attributed to cost reductions and efficiencies in solar production.<sup>117</sup>

Unfortunately, these important technological advances and substantial cost savings have not been as impactful as possible because the renewable energy industry still needs more financial capital to accomplish its goals.<sup>118</sup> Financial capital for renewable energy projects, for the most part, remains prohibitively expensive because renewables cannot take advantage of inexpensive public capital like their fossil fuel competitors.<sup>119</sup> As a result, the renewable energy industry still relies on expensive private capital from individual companies and investors.<sup>120</sup> The renewable energy industry desperately needs financial innovation for two reasons: (1) to allow renewable energy to compete with fossil fuels; and (2) to increase future renewable energy capacity development.<sup>121</sup>

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116. See Giles Parkinson, *Why Solar Costs Will Fall Another 40% in Just Two Years*, RENEWECONOMY (Jan. 20, 2015), <http://reneweconomy.com.au/2015/why-solar-costs-will-fall-another-40-in-just-two-years-21235> (citing statistics about significant drops in solar panel prices).

117. See *id.* (discussing improved solar equipment costs and solar installation efficiencies developed).

118. See *Policy Uncertainty and Lack of Renewable Energy Expertise Deters Institutional Investors*, EY (Nov. 21, 2013), [http://www.ey.com/GL/en/Newsroom/News-releases/News\\_Policy-uncertainty-and-lack-of-renewable-energy-expertise-deters-institutional-investors](http://www.ey.com/GL/en/Newsroom/News-releases/News_Policy-uncertainty-and-lack-of-renewable-energy-expertise-deters-institutional-investors) (discussing solar industry's lack of institutional financial investment). In a capital-intensive industry, such as renewable energy, institutional investment is crucial for success. See *Energy Competitive*, *supra* note 18. Institutional capital, such as mutual funds and endowment funds, can provide the renewable energy industry the upfront capital needed to complete large-scale renewable deals. *Id.*

119. See Keith Martin, *Drive to Reduce the Cost of Capital; Renewable Energy Companies and the Obama Administration are Looking for Ways to Reduce the Cost of Capital for Renewable Energy Projects*, CHADBOURNE (Apr. 2013), [http://www.chadbourne.com/Drive\\_to\\_Reduce\\_the\\_Cost\\_of\\_Capital\\_projectfinance/](http://www.chadbourne.com/Drive_to_Reduce_the_Cost_of_Capital_projectfinance/) (discussing renewables current expensive funding sources and desire for cheaper alternatives).

120. See Jurgen Weiss & Mark Sarro, *The Importance of Long-term Contracting for Facilitating Renewable Energy Project Development*, THE BRATTLE GROUP, 12 (May 7, 2013), [http://www.brattle.com/system/publications/pdfs/000/004/927/original/The\\_Importance\\_of\\_Long-Term\\_Contracting\\_for\\_Facilitating\\_Renewable\\_Energy\\_Project\\_Development\\_Weiss\\_Sarro\\_May\\_7\\_2013.pdf?1380317003](http://www.brattle.com/system/publications/pdfs/000/004/927/original/The_Importance_of_Long-Term_Contracting_for_Facilitating_Renewable_Energy_Project_Development_Weiss_Sarro_May_7_2013.pdf?1380317003) (explaining that renewable projects typically rely on privately-placed capital).

121. See Felix Mormann & Dan Reicher, *Invest But Reform, Smarter Finance for Cleaner Energy: Open Up Master Limited Partnerships (MLPS) and Real Estate Investment Trusts (REITS) to Renewable Energy Investment*, BROOKINGS, 2 (Nov. 2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/11/13-federalism/13-clean-energy-investment.pdf> [hereinafter *Invest But Reform*] (discussing renewable energy industry's financial innovation and how it did not keep pace with renewables' related technological innovation). The cost of renewable projects continues to drop as manufacturers develop less expensive and more efficient

Renewable energy project financing is currently limited, scarce, and expensive.<sup>122</sup> Most renewable energy project funding comes from Congress's 2009 American Recovery and Reconstruction Act in the form of tax credits and accelerated depreciation.<sup>123</sup> The Act's funding, however, is depleting, and Congress is reluctant to pass any additional renewable energy tax credits.<sup>124</sup> For example, in 2014, Congress let the wind power industry's vital production tax credit expire.<sup>125</sup> Congress could do the same with the solar industry's investment tax credit in 2016.<sup>126</sup> Uncertainty surrounding the future of renewable energy tax credits is an inefficient way for the government to support renewables.<sup>127</sup>

The federal government's tax credit and accelerated depreciation incentives are also inefficient because most corporations, including renewable developers, do not have large enough tax liabilities to take advantage of the tax credits or large enough taxable incomes to take advantage of renewable projects' accelerated depreciation.<sup>128</sup> To utilize a one-dollar tax credit, a corporation

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processes. *See* Lacey, *supra* note 115. Renewable capacity, however, has not kept pace with the improvements in technology because financial capital for renewable projects remains prohibitively expensive. *See Energy Competitive, supra* note 18.

122. *See Invest But Reform, supra* note 121, at 2-3 (explaining modern renewable energy finance faces expensive realities).

123. *See id.* (discussing how most renewable energy funding comes from American Recovery and Reconstruction Act).

124. *See id.* (elucidating to Congress's fickle nature around renewable energy subsidies); *see also* Trefis Team, *Solar Investment Tax Credit: Does Republican Win Increase Uncertainty on Extension?*, FORBES (Nov. 6, 2014, 1:50 PM), <http://www.forbes.com/sites/greatspeculations/2014/11/06/solar-investment-tax-credit-does-republican-win-increase-uncertainty-on-extension/> (discussing how House's current Republican composition might make it difficult to extend Solar's investment tax credit beyond 2016).

125. *See Renewable Electricity Production Tax Credit (PTC)*, DSIRE, <http://programs.dsireusa.org/system/program/detail/734> (last updated Apr. 13, 2015) (emphasizing how Congress let wind industry's production tax credit expire in 2014).

126. *See id.* (showing Congress's ability to let important tax credits expire); *see also* Team, *supra* note 124 (discussing Congress's desire to let Solar's investment tax credit expire in 2016).

127. *See Energy Competitive, supra* note 18 (highlighting Congress's fickle nature and why tax credits provide inefficient renewable support). Renewable tax credits are an inefficient way to support renewable energy because investors remain uncertain about whether Congress will continue to permit these credits to exist. *Id.* Outside investors, such as companies and individuals, do not like uncertainty regarding an investment because it does not provide for guarantees related to a project's rate of return. *Id.* Congress's current regime related to credits needs to gain more certainty to encourage more investment and more reliable rates of return. *Id.*

128. *See id.* (discussing how renewable energy projects struggle to take advantage of tax benefits).



164 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

must have a one-dollar tax liability to offset.<sup>129</sup> Renewable developers face significant financial expenditures when beginning new projects, including purchasing equipment and materials like solar panels, wind turbines, and project engineers.<sup>130</sup> Considering renewable projects' substantial upfront costs, it could take years for a project to be profitable and generate enough tax liability to take advantage of federal tax credits.<sup>131</sup> Thus, developers will not receive any financial benefits until their projects generate enough profit to offset their losses so they actually have federal tax liability.<sup>132</sup>

The federal government's tax credit support of renewables does not match the modern realities of renewable project development.<sup>133</sup> Developers need cash rebates up front to help pay renewable projects' large fixed costs including solar panels, wind turbines, and engineering design.<sup>134</sup> Congress's current tax regime fails because it provides developers with financial benefits too late in projects' life cycles.<sup>135</sup>

A similar problem occurs with accelerated depreciation.<sup>136</sup> Accelerated depreciation allows renewable energy developers to reduce their projects' net income by a higher than usual depreciation

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129. See Robertson Williams, *Income Tax Issues: What is the Difference Between Tax Deductions and Tax Credits?*, TAX POLY CENTER, <http://www.taxpolicycenter.org/briefing-book/background/issues/credits.cfm> (last updated Sept. 26, 2011) (explaining how companies actually use tax credits under U.S. tax code).

130. See *Invest But Reform*, *supra* note 121, at 2 (explaining renewables high upfront capital costs).

131. See *id.* (discussing how renewable projects' return on investment takes numerous years).

132. See *Renewable Electricity Faces Financing Challenges with the End of Federal 1603 Grant Program*, RENEWABLE ENERGY PROJECT FIN. (June 29, 2012, 12:42 PM), <https://financere.nrel.gov/finance/content/renewable-electricity-faces-financing-challenges-end-federal-1603-grant-program> (explaining 1603 cash grant program). The 1603 cash grant program was a federal program designed to help renewable developers implement projects because they no longer had to rely on outside parties to monetize tax benefits. *Id.* When the 1603 cash grant program expired, renewable developers again found it difficult to monetize their project's tax benefits because they were forced to rely on outside third parties. *Id.*

133. See *id.* (providing 1603 grant program's expiration date). Without the 1603 grant program, developers again must rely on third-party financiers. *Id.*

134. See *id.* (explaining how 1603's up-front government payment made it easier for renewable developers to complete projects).

135. See *id.* (explaining that 1603's expiration makes it more difficult for developers to complete renewable projects). The ending of 1603 makes it much more difficult for developers because they can only obtain their project's tax benefits late in their project's life cycle unless they secure outside investment. *Id.*

136. See *Energy Competitive*, *supra* note 18 (discussing how renewable projects struggle to utilize accelerated depreciation).

allowance and thereby creates a similar problem.<sup>137</sup> For example, a corporate rooftop solar array may cost \$100,000 and have an expected life of twenty years.<sup>138</sup> Through accelerated depreciation, Congress allows the developer to recoup the cost of this income-producing asset with a yearly tax deduction from the project's net income.<sup>139</sup> Under the customary straight-line depreciation method, Congress allows this renewable energy developer to deduct five thousand dollars per year from his project's net income for twenty years ( $\$100,000/20$  years).<sup>140</sup> Under the more favorable accelerated depreciation regime, Congress allows this same renewable developer to take substantial depreciation deductions early in the project's life cycle.<sup>141</sup> For example, the developer can deduct twenty thousand dollars per year from the project's net income for the project's first five years.<sup>142</sup> Based on the accelerated cost recovery, the renewable developer can use additional funds to invest elsewhere, such as in more renewable energy projects.<sup>143</sup>

While these depreciation deductions are certainly beneficial, they will not be useful unless the renewable developer's project has enough taxable income to reduce.<sup>144</sup> Tax deductions like these can only be used when the taxpayer has sufficient taxable income to offset.<sup>145</sup> Renewable projects usually do not have substantial taxable incomes early in the project's life cycle because of all the expensive capital investment.<sup>146</sup>

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137. See *The Tax Break-Down: Accelerated Depreciation*, COMMITTEE FOR A RESPONSIBLE FED. BUDGET (Sept. 20, 2013), <http://crfb.org/blogs/tax-break-down-accelerated-depreciation> (explaining how accelerated depreciation works).

138. See *id.* (explaining how depreciation calculations are configured).

139. See Jim Mueller, *Depreciation: Straight-Line vs. Double-Declining Methods*, INVESTOPEDIA, <http://www.investopedia.com/articles/06/depreciation.asp> (last visited Dec. 21, 2015) (explaining both straight line and accelerated depreciation).

140. See *id.* (comparing straight-line depreciation to an accelerated depreciation method: double-declining balance).

141. See *id.* (showing accelerated depreciation model using double-declining balance method).

142. See *id.* (showing accelerated depreciation method).

143. See *id.* (demonstrating larger accelerated depreciation balances). Under accelerated depreciation, the developer recoups an investment much faster than under the straight-line depreciation method. *Id.*

144. See Kirkland, *supra* note 18 (explaining how cash-rich companies help renewable developers utilize their project's tax benefits). Without cash-rich companies' contributions, renewable developers cannot independently take advantage of their project's tax benefits. *Id.*

145. See *id.* (discussing cash-rich corporations partnering with renewable developers). Cash-rich companies have ample taxable incomes and tax liabilities to use the renewable project's tax benefits. *Id.*

146. See *Invest But Reform*, *supra* note 121, at 2 (explaining renewables substantial up-front capital costs).

166 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

In response to Congress's well-intentioned—but poorly designed—renewable incentives, investment professionals created a “tax-equity” market.<sup>147</sup> The tax-equity market emerged as a solution to renewable energy developers' funding problems.<sup>148</sup> In this market, renewable energy developers team with large, multi-national corporations that provide up-front renewable project funds in exchange for the renewable energy project's tax benefits.<sup>149</sup> The large corporations partnering with renewable developers have the required substantial taxable incomes and tax liabilities to use the project's accelerated depreciation and tax credit benefits.<sup>150</sup> Renewable developers trade their project's tax benefits for the multi-national corporation's financial capital.<sup>151</sup>

While efficient in theory, the tax-equity market has proven to be prohibitively expensive and an ineffective way to support renewable developers.<sup>152</sup> For example, most tax equity investors are large multi-national banks looking to offset their own substantial tax liabilities and incomes.<sup>153</sup> These banks provide renewable developers with the up-front capital required, but they charge steep and unaffordable prices.<sup>154</sup> Tax-equity investing also imposes wasteful administrative spending for both the renewable developer and the multi-national corporation entering the deal.<sup>155</sup> In order to complete a tax-equity project, renewable developers and the interested multi-national corporation must hire expensive professionals such

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147. See Josh Lutton, *Tax Equity 101: Structures*, WOODLAWN ASSOCIATES MGMT. CONSULTING (Mar. 8, 2013), <http://www.woodlawnassociates.com/tax-equity-101/> (explaining circumstances under which tax-equity market developed).

148. See *id.* (providing how tax-equity market originated and listing companies who have helped provide “tax equity” to renewable developers).

149. See *id.* (explaining tax-equity structure between renewable developers and corporations).

150. See *id.* (demonstrating benefits of partnering with corporations to form tax-equity market).

151. See Liz Hoffman, *Tax Equity Financing Lures Corporations to Renewables*, LAW360 (Mar. 6, 2012, 3:33 PM), <https://www.akingump.com/images/content/9/3/v4/9302/Tax-Equity-Financing-Lures-Corporations-To-Renewables.pdf> (illustrating how Google has given renewable developers substantial sums of cash in exchange for their projects' significant tax benefits).

152. See *id.* (discussing how tax-equity market is not cost-effective).

153. See Dipa Sharif et al., *The Return - and Returns - of Tax Equity for US Renewable Projects*, BLOOMBERG NEW ENERGY FIN., 3 (Nov. 21, 2011), available at <https://www.cohnreznick.com/sites/default/files/The%20Return%20%E2%80%93%20and%20Returns%20%E2%80%93%20of%20Tax%20Equity%20for%20US%20Renewable%20Projects.pdf> (discussing renewable developer's typical tax-equity partner).

154. See *id.* at 24 (discussing banks' role in typical tax-equity transaction).

155. See Hoffman, *supra* note 151 (discussing why tax-equity investing is unreasonably expensive).

2016] CONGRESS, GIVE RENEWABLE ENERGY A FAIR FIGHT 167

as tax accountants and attorneys to ensure the deal is structured so the multi-national corporation takes advantage of all the project's tax benefits.<sup>156</sup> While Congress may not have intended the emergence of a tax-equity market, its current renewable support regime has led to renewable developers paying exorbitant prices for socially, environmentally, and economically beneficial projects.<sup>157</sup>

Unlike its treatment of renewable developers, the Internal Revenue Code (IRC) allows fossil fuel developers to take advantage of the MLP structure and access inexpensive public capital markets cheaply.<sup>158</sup> Fossil fuel developers also save on transaction costs by avoiding the expensive professional fees associated with tax-equity deals in the renewable energy sector.<sup>159</sup>

#### IV. ANALYSIS: CONGRESS MUST ACT AND EXTEND MLPs TO RENEWABLES

This section demonstrates that MLPs are the superior choice for the renewable energy industry by showing their ability to generate substantial returns on investment (ROI).<sup>160</sup> Furthermore, this section highlights Congress's unexplainable reasons for denying MLPs to renewables and illustrates how Congress can alleviate all these concerns by extending MLPs to renewables.<sup>161</sup> This section, however, also explains why these potential shortcomings are insignificant.<sup>162</sup> This section concludes by addressing the potential shortcomings associated with extending MLPs to renewable developers.<sup>163</sup>

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156. *See id.* (explaining how renewable energy financing is expensive and limited).

157. *See id.* (discussing cost associated with Congress's lack of support for renewable capital).

158. *See* 26 U.S.C. § 7704 (2012) (permitting fossil fuels to utilize MLPs while specifically excluding renewable energy).

159. *See* Scott Fisher, *Tax Credits, Tax Equity, and Alternatives to Spur Clean Energy Financing*, U.S. PARTNERSHIP FOR RENEWABLE ENERGY FIN., <http://uspref.org/wp-content/uploads/2011/09/Tax-Credits-Tax-Equity-for-Clean-Energy-Financing.pdf> (last visited Sept. 24, 2015) (detailing specific costs associated with customary tax-equity transactions).

160. *See* Mantius, *supra* note 16 (showing how MLP ROIs are superior to S&P stock index ROIs).

161. *See id.* (discussing Congress's inexplicable reasons for denying renewables access to MLPs); *see also Invest But Reform, supra* note 121, at 3-4 (discussing advantages of MLPs and why Congress should extend them to renewables).

162. *See* Mantius, *supra* note 16 (discussing why MLP bill's potential shortcomings are inconsequential).

163. *See id.* (addressing why MLP bill's shortcomings can be overlooked).

168 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

A. MLPs Generate Substantial ROIs and Savings Renewables Need

MLP investments outperform most traditional equity investments.<sup>164</sup> According to one commentator, “\$1,000 invested [ten] years ago in MLPs would have a value of \$4,924, while \$1,000 invested in Standard & Poor’s stock index over the same period would be worth \$2,116.”<sup>165</sup> MLPs generate substantial ROIs because their structure allows companies to distribute nearly all of the profits to their investors.<sup>166</sup> MLPs are thus a popular investment for investors and companies.<sup>167</sup>

MLPs can also potentially save the renewable energy industry substantial sums of money.<sup>168</sup> Industry experts estimate that total wind project costs would drop by forty percent if the renewable energy industry utilized MLPs.<sup>169</sup> MLPs facilitate substantial reductions in project capital costs because their structure increases companies’ access to capital supply.<sup>170</sup> This increased capital supply is the result of growing national interest to invest in MLPs due to their proven track record and substantial returns.<sup>171</sup> The mass of interested investors allows MLPs to pay less to borrow money for their capital supply.<sup>172</sup> The presence of more investors drives down the cost of capital because the bargaining power shifts from the in-

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164. See Richard Moroney, *Unlocking the MLP*, FORBES (May 6, 2013, 2:31 PM), <http://www.forbes.com/newsletters/dow-theory-forecasts/2013/05/06/unlocking-the-mlp/> (providing that Alerian MLP Index has substantially outperformed S&P 500 Index over the past fifteen years). The Alerian MLP Index allows investors to invest in a fund that tracks the performance of all MLPs. *Id.* The Alerian MLP Index has consistently outperformed the corporate stock S&P 500 Index. *Id.*

165. See Mantius, *supra* note 16 (comparing ROI for MLPs as opposed to S&P stock index).

166. See *id.* (explaining ability of MLPs to provide substantial returns to investors).

167. See *id.* (discussing growing popularity of retail and institutional investors to invest in MLPs); see also *Master Limited Partnerships 101*, *supra* note 30 (discussing MLP’s investor base).

168. See Mantius, *supra* note 16 (providing statistics for renewables’ potential savings with MLPs).

169. See *id.* (highlighting specific financial advantages of MLPs including all the reduced costs related to turbines, equipment, and engineering).

170. See *id.* (discussing how effective lobbying extended MLPs to only certain industries).

171. See Javier E. David, *Investors Flock to Energy Partnerships in New Shale Play*, CNBC (Apr. 3, 2014, 11:51 AM), <http://www.cnbc.com/2014/04/03/investing-in-mlps-master-limited-partnerships-feed-off-us-energy-boom.html> (discussing heightened interest in investing in MLPs).

172. See *id.* (discussing all parties interested in MLP investing).

2016] CONGRESS, GIVE RENEWABLE ENERGY A FAIR FIGHT 169

dividual investor to the renewable developer, who is now capable of completing more projects.<sup>173</sup>

#### B. The Federal Government's Role and the Extension of the MLP Structure to the Renewable Energy Industry

Congress determines who may take advantage of the MLP structure.<sup>174</sup> Congress exercised this authority in 1987 when it passed IRC Section 7704, which limits MLP usage to companies who derive ninety percent or more of their income from congressionally-specified sources.<sup>175</sup> The legislation's qualifying source language includes income derived from most natural resources except for renewable energy.<sup>176</sup> In 2008, Congress amended Section 7704's definition of "qualifying income" to include carbon dioxide, ethanol, biodiesel, and other alternative fuels.<sup>177</sup> Congress, however, expressly refused to address renewable energy, waiting until its planned comprehensive tax reform.<sup>178</sup>

Congress's refusal to extend the MLP structure to renewable energy has widespread environmental implications.<sup>179</sup> Congress's decision to keep MLPs from renewable energy functions essentially as a "reverse carbon tax" by incentivizing investors to continue to invest in tax-preferred fossil fuel MLPs rather than renewable energy.<sup>180</sup> Current industry investment statistics support this theory.<sup>181</sup> Since 2008, investors have poured hundreds of billions of dollars into traditional fossil fuel companies, bolstering an already strong industry, while ignoring the capital-hungry renewable energy industry.<sup>182</sup> Congress's refusal to extend the MLP structure to the renewable energy industry discretely perpetuates the country's con-

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173. *See id.* (explaining how industry's influx of capital will lead to dynamic change).

174. *See* Mantius, *supra* note 16 (discussing Congress's past IRC amendment to offer MLPs to more industries).

175. *See id.* (detailing effects of Congress's past amendment on companies' ability to use MLPs).

176. *See id.* (emphasizing how Congress specifically did not include renewable energy in its legislation).

177. *See id.* (discussing more recent congressional amendments).

178. *See id.* (providing details of Congress's 2008 amendment).

179. *See* Mantius, *supra* note 16 (discussing Congress's refusal to extend MLPs to renewables). Fossil fuels remain a financially advantageous investment choice because Congress continues to reject subsidizing renewables. *Id.*

180. *See id.* (mentioning "reverse carbon tax" as reason to prefer fossil fuels).

181. *See id.* (discussing how billions have recently been invested in fossil fuel MLPs).

182. *See id.* (discussing investment community's continued and substantial investment in tax-preferred fossil fuel MLPs).

170 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

tinued reliance on fossil fuels.<sup>183</sup> Congress has the power to change this trajectory, but most legislators refuse to address the issue; they instead prefer to wait until Congress fully addresses all tax issues through comprehensive tax reform.<sup>184</sup>

### C. Congress's Opportunity

Delaware U.S. Senator (Sen.), Christopher Coons, recently proposed a bill that would level the financial playing field for all types of energy development.<sup>185</sup> Sen. Coon's bill, titled the Master Limited Partnerships Parity Act (MLP bill), focuses on extending the MLP structure to all energy projects, including renewable energy.<sup>186</sup> The MLP bill specifically focuses on resolving the current tax loophole that allows only fossil fuel developers to take advantage of MLPs.<sup>187</sup> To this end, the MLP bill seeks to amend Section 7704's "qualifying income" definition to include inexhaustible energy sources, in addition to exhaustible energy sources.<sup>188</sup>

The MLP bill has received strong bi-partisan support, and has a companion bill in the House of Representatives.<sup>189</sup> The academic community also strongly supports the MLP bill.<sup>190</sup> In 2012, two Stanford University professors wrote an opinion-editorial in the *New York Times* endorsing the MLP bill and urging Congress to adopt it.<sup>191</sup> The professors argued that the MLP bill would improve the renewable energy industry's access to capital in a more efficient manner than the country's current tax-credit system.<sup>192</sup> The professors implored Congress to give renewable energy developers the

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183. *See id.* (disclosing "reverse carbon tax" as basis for continuing reliance on fossil fuels).

184. *See* Mantius, *supra* note 16 (detailing legislators' reluctance to pass MLP bill).

185. *See* Chris Coons, *The Master Limited Partnerships Parity Act*, U.S. SENATOR CHRISTOPHER COONS OF DEL., <http://www.coons.senate.gov/issues/master-limited-partnerships-parity-act> (last visited Feb. 25, 2015) (discussing MLP bill proposal).

186. *See id.* (summarizing MLP bill proposal).

187. *See id.* (illustrating MLP bill's proposed amendments and benefits for renewable energy).

188. *See id.* (citing MLPs bill's proposed objectives to make definition more comprehensive).

189. *See U.S. House and Senate Consider Companion Bills to Reduce Cost of Financing Renewable Energy Resources*, DISTRICTENERGY (Oct. 11, 2012), <http://www.districtenergy.org/blog/2012/10/11/us-house-and-senate-consider-companion-bills-to-reduce-cost-of-financing-renewable-energy-resources/> (discussing support behind companion House and Senate bills).

190. *See Energy Competitive, supra* note 18 (providing Stanford professors' support of Master Limited Partnerships Parity Act).

191. *See id.* (offering details of Stanford professors' opinion editorial).

192. *See id.* (discussing bill's ability to efficiently raise capital for renewables).

same financial footing as traditional fossil fuel developers, thereby allowing renewable energy producers to compete without Congress's tax credit support.<sup>193</sup>

Even with strong bi-partisan support, the MLP bill is unlikely to pass.<sup>194</sup> For example, The 113th Congress denied an early version of the bill because many legislators wanted to wait to pass the bill alongside comprehensive tax reform.<sup>195</sup> In 2015, Sen. Coons reintroduced the bill and the 114th Congress could change their mind because comprehensive tax reform looks far off.<sup>196</sup> Congress waiting to pass the bill has serious consequences because leaving the MLP bill untouched allows fossil fuels to financially dominate renewable energy, while simultaneously harming the environment.<sup>197</sup>

Other members of Congress have expressed that they will only extend MLPs to the renewable energy industry if Congress discontinues all other existing tax subsidies to the industry.<sup>198</sup> This argument has the same inaction problem as waiting for comprehensive tax reform because Congress has committed itself to renewable energy tax credits through 2016; therefore, changes would not occur

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193. *See id.* (explaining how if changes are not made to renewables' current funding mechanisms, they will never adequately be able to compete with alternatives).

194. *See Bipartisan Support for Master Limited Partnerships Parity Act Grows*, U.S. SENATOR CHRISTOPHER COONS OF DEL. (Nov. 12, 2013), <http://www.coons.senate.gov/newsroom/releases/release/bipartisan-support-for-master-limited-partnerships-parity-act-grows> (discussing MLP bill's increased bipartisan support, as evidenced by U.S. Senators Mary Landrieu and Susan Collins choosing to co-sponsor bill).

195. *See Mantius supra* note 16 (discussing federal legislators' different opinions on how to pass MLP bill). While some legislators want to wait to pass the bill along with more comprehensive tax reform, other legislators would prefer to abandon all tax subsidies to energy companies. *See id.*

196. *See MLP Parity Act Reintroduced*, BAKER BOTTS, (June 2015), <http://www.bakerbotts.com/ideas/publications/2015/06/mlp-update> (providing Sen. Coon's 2015 MLP bill reintroduction). *See also* Republican Staff Comm. on Fin., *Comprehensive Tax Reform for 2015 and Beyond*, THE U.S. SENATE COMMITTEE ON FIN. (Dec. 2014), <http://www.finance.senate.gov/newsroom/ranking/download/?id=41af09bb-e75d-4246-9313-98eb5b9de7bc> (providing mere discussions of comprehensive tax reform). "[I]f we are ever going to make tax reform a reality, both parties will have to come together to get it done." *Id.* "To some, that may seem like a fairy tale." *Id.*

197. *See Mantius, supra* note 16 (discussing how continuing with status quo leads to "reverse carbon tax" and poses environmental concerns).

198. *See id.* (explaining lawmakers' rationale for waiting to pass MLP bill).



172 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

until *at least* 2016.<sup>199</sup> In sum, even with bipartisan support, Congress is unlikely to pass the MLP bill anytime soon.<sup>200</sup>

#### D. Benefits of Passing the MLP Bill

As previously discussed in earlier sections, passing the MLP bill has substantial advantages for renewable energy, as it would increase renewable energy's access to capital and dramatically reduce renewable energy projects' costs.<sup>201</sup> Extending MLPs to renewable energy projects would open renewable projects to a new class of investors, which would reduce project costs because more access to capital means more bargaining power and options for renewable energy developers.<sup>202</sup>

Extending the MLP structure to the renewable energy industry would also give the industry the predictability and stability needed to attract financial capital.<sup>203</sup> Financial capital flocks to stable industries with relatively low risk and predictable rates of return.<sup>204</sup> Renewable energy projects, especially solar and wind projects, generate these stable and predictable rates of return.<sup>205</sup> Allowing these solar and wind projects to use MLPs would permit these projects to take advantage of the abundance of public capital that renewable projects currently lack.<sup>206</sup>

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199. *See id.* (discussing how lawmakers do not want MLP reform until it comes with comprehensive tax reform); *see also* Team, *supra* note 124 (explaining Congress's commitment to Solar's investment tax credit through 2016).

200. *See* Rapiere, *supra* note 15 (explaining why Sen. Coons's MLP Bill is unlikely to pass). Even with strong bipartisan support, "there are no hearings scheduled, and really nothing in the news about it. Nobody in Congress seems to be pushing it." *Id.*

201. *See Invest But Reform*, *supra* note 121, at 3-4 (explaining advantages MLPs could extend to renewables).

202. *See Energy Competitive*, *supra* note 18 (detailing how MLPs can attract many new investors to renewables).

203. *See* W. Bruce Bullock et al., *Leveling the Playing Field: The Case for Master Limited Partnerships for Renewables*, AM. WIND ENERGY ASS'N, 8 (May 2012), <http://awea.files.cms-http://awea.files.cms-plus.com/FileDownloads/pdfs/MLP%20White%20Paper%20Final.pdf> (stating MLPs appeal to many different investors "[b]ecause of their high yield and relative safety").

204. *See id.* at 18-19 (discussing how renewables wanting to attract capital, such as solar and wind, must come up with sustainable business models that banks want to market).

205. *See* Mantius, *supra* note 16 (discussing amending IRC 7704 and policy implications); *see also* Molly F. Sherlock & Mark P. Keightley, *Master Limited Partnerships: A Policy Option for the Renewable Energy Industry*, CONG. RES. SERV., 14 (June 28, 2011), *available at* <http://www.ourenergypolicy.org/wp-content/uploads/2013/08/masterlmtpartnerships.pdf> (analyzing policy implications of extending MLPs to renewables).

206. *See Energy Competitive*, *supra* note 18 (arguing that MLPs would provide renewable energy projects with desperately needed capital).

Amending IRC Section 7704 to include renewable energy would also provide funding permanence not currently found in the tax credit system because it allows renewable developers to always rely on public capital rather than certain-to-expire tax credits.<sup>207</sup> This funding permanence would also allow renewable projects to take advantage of certain tax benefits.<sup>208</sup> The current tax credit regime does not offer renewables funding permanence and long-term renewable investment because Congress's tax credit support always has limited time frames.<sup>209</sup> For instance, Congress letting the wind industry's vital production tax credit expire in 2014 made completing wind projects more expensive as developers no longer have federal support to rely on.<sup>210</sup> Most renewable tax credit programs face these same limitations.<sup>211</sup> Congress recognizing renewables in the IRC would alleviate many of these time frame concerns.<sup>212</sup>

Extending MLPs to the renewable energy industry has additional economic and environmental benefits; more capital creates jobs, promotes a more diverse and carbon-neutral energy supply, and democratizes the renewable energy investment process.<sup>213</sup> First, renewable energy projects utilizing MLPs would create more jobs because increased industry capital leads to more development and projects, and subsequently more jobs.<sup>214</sup> Second, the MLP structure would promote a more diverse and carbon-neutral energy supply because renewables would financially compete with the fossil fuel industry.<sup>215</sup> Investors would no longer lose out on better financial opportunities in the fossil fuel sector because renewable

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207. *See id.* (discussing Congress's fickle, renewable tax-credit regime and how MLPs could permanently resolve these issues).

208. *See id.* (detailing MLP bill's simple required tax code change).

209. *See Solar Investment Tax Credit (ITC)*, SOLAR ENERGY INDUS. ASS'N, <http://www.seia.org/policy/finance-tax/solar-investment-tax-credit> (last visited July 28, 2015) (displaying Solar investment tax credit's deadline of December 31, 2016); *see also Renewable Electricity Production Tax Credit (PTC)*, *supra* note 125 (showing how Congress allowed production tax credit to expire in 2014).

210. *See Renewable Electricity Production Tax Credit (PTC)*, *supra* note 125 (detailing Congress allowed tax credit to expire).

211. *See Solar Investment Tax Credit (ITC)*, *supra* note 209 (detailing Solar investment tax credit's imminent expiration).

212. *See Energy Competitive*, *supra* note 18 (hypothesizing that fixing IRC's distinction between inexhaustible and exhaustible energy supplies would give renewables needed financial stability to succeed).

213. *See Invest But Reform*, *supra* note 121, at 3-4 (discussing MLP benefits for renewables).

214. *See id.* (discussing renewable energy's need for good jobs and talent).

215. *See id.* (explaining how MLPs would diminish financial disparity between renewables and fossil fuels).

174 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

projects could offer similar rates of return.<sup>216</sup> A comparable rate of return to fossil fuels would increase renewables' sales value and likelihood of completing more renewable projects because renewables are a socially and economically beneficial alternative.<sup>217</sup>

Third, extending MLPs to renewable energy can democratize the renewable energy investment process because individuals can invest in renewable energy projects as limited partners through the MLP structure.<sup>218</sup> This is important because, as it currently stands, only wealthier individuals and cash-rich companies have the opportunity to invest in renewable projects.<sup>219</sup> In fact, large cash-rich companies are the main investors for current renewable projects.<sup>220</sup> Individuals looking to make a small contribution, like buying a few shares of a company's stock, cannot offer this kind of monetary support.<sup>221</sup> Extending MLPs to renewables makes this small-scale investing possible and more accessible to all.<sup>222</sup>

#### V. THE MLP BILL'S POTENTIAL SHORTCOMINGS, AND THEIR INSIGNIFICANCE

Although lawmakers recognize the MLP bill's shortcomings, extending MLPs to renewable energy undoubtedly has both environmental and economic benefits.<sup>223</sup> One of Congress's main reasons for limiting MLP usage is to prevent the tax base from further erosion.<sup>224</sup> Lawmakers are understandably reluctant to offer large tax advantages to a new class of projects and companies, and fur-

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216. *See id.* (discussing how MLPs allow renewables to compete financially with fossil fuels).

217. *See id.* (providing how renewables taking advantage of MLPs would lead to more renewable energy development).

218. *See Invest But Reform, supra* note 121, at 3 (analogizing MLPs to REITs and expressing how REITs allow for large-scale retail investment).

219. *See id.* (detailing handful of investors that currently invest in renewable projects).

220. *See Kirkland, supra* note 18 (discussing cash-rich companies that invest in renewable projects).

221. *See id.* (providing that individual investors cannot provide small-scale investments in renewable projects).

222. *See id.* (analogizing MLPs to REITs and describing how REITs are capable of including small-scale retail investors).

223. *See Mantius, supra* note 16 (examining lawmakers' analyses of MLP bill's shortcomings). Some legislators want to consider the MLP bill as part of Congress's more comprehensive tax reform, while others want to eliminate MLPs entirely. *Id.*

224. *See Bullock, supra* note 203, at 18 (highlighting difficulty of attaining MLP bill approval in current political climate).

ther deplete stagnant government revenues.<sup>225</sup> The U.S. corporate tax base has been shrinking for years due to one of the highest corporate tax rates in the world.<sup>226</sup> Many multi-national corporations have moved their global headquarters abroad to save in income taxes.<sup>227</sup> If MLPs were expanded, most renewable energy companies would switch from corporations to MLPs in order to reduce their tax burden.<sup>228</sup>

Lawmakers are also reluctant to allow renewable energy projects to take advantage of MLP structures because the industry is so new and there is not enough data to prove that renewables are a safe investment that produce steady cash flows for investors.<sup>229</sup> MLP investors expect safe investments with steady cash returns.<sup>230</sup> Bankers who market MLPs also want to know the business has the underlying cash flows to fit the traditional MLP benefit of returning capital to investors.<sup>231</sup> For example, the oil pipeline business has been a great fit for the MLP structure because of its stability in a large industry and its ability to generate steady cash returns.<sup>232</sup>

Not all renewable projects, however, are created equal when it comes to cash returns.<sup>233</sup> Many renewable technologies do not have proven track records of generating steady cash flows, like conventional oil and gas.<sup>234</sup> Wind and solar, however, are the excep-

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225. *See id.* (discussing Congress's reluctance to pass any initiatives without closer examination).

226. *See Corporate Tax Rates Table, supra* note 74 (exhibiting high U.S. corporate tax rate).

227. *See* Richard Rubin, *Cash Abroad Rises \$206 Billion as Apple to IBM Avoid Tax*, BLOOMBERG BUSINESS (Mar. 12, 2014, 2:47 PM), <http://www.bloomberg.com/news/articles/2014-03-12/cash-abroad-rises-206-billion-as-apple-to-ibm-avoid-tax> (exposing how many U.S. corporations have shifted profits abroad to avoid steep U.S. income taxes).

228. *See* Mantius, *supra* note 16 (explaining how most companies switched to MLPs when available). MLP proliferation did not slow down until Congress specifically sought to limit MLP usage. *Id.*

229. *See* Timothy Devetski & Sean Moran, *Pros And Cons Of Recent Renewable Energy Bill*, LAW360 (May 8, 2013, 12:17 PM), <http://www.law360.com/articles/438680/pros-and-cons-of-recent-renewable-energy-bill> (discussing nature of renewable energy projects and their ability to generate steady cash flows).

230. *See id.* (displaying what bankers typically expect from MLPs).

231. *See id.* (discussing how MLPs need to be able to prove sustained underlying cash flows to support cash distributions).

232. *See* Mider, *supra* note 113 (highlighting how many MLPs have been successful for energy infrastructure projects).

233. *See* Sherlock & Keightley, *supra* note 205, at 11 (explaining how returns from unproven renewable technologies are not clear and, therefore, not good for MLPs).

234. *See id.* (explaining how MLPs will not be able to help unproven and non-commercialized renewable technology).

176 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

tions to renewable energy's lack of steady cash flows.<sup>235</sup> These industries have established strong precedent for generating stable and predictable cash flows over time, which fits the traditional MLP structure.<sup>236</sup> Congress, therefore, should at least allow solar and wind projects the opportunity to use MLPs.<sup>237</sup>

Finally, some political experts believe the U.S. would benefit from limiting the MLP structure even further.<sup>238</sup> Rather than extend MLPs to renewables, these experts would revoke the fossil fuel industry's ability to use MLPs.<sup>239</sup> Supporters of this argument believe the government must improve the corporate tax base in our current economy.<sup>240</sup> Preventing fossil fuels from utilizing MLPs helps level the playing field for renewable energy in a more economically efficient way for the government.<sup>241</sup> Eradicating MLPs altogether increases government revenues from traditional fossil fuels and maintains existing revenues from the renewable energy industry.<sup>242</sup>

While eliminating MLPs does level the financial playing field for renewables and fossil fuels, it does not provide the renewable energy industry with the incentives, innovation, and capital needed to grow.<sup>243</sup> Eliminating MLPs altogether keeps substantial limits on renewables' access to capital while more established fossil fuels would have an easier time raising funds in traditional capital markets.<sup>244</sup>

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235. See Devetski & Moran, *supra* note 229 (discussing solar and wind's track record for producing steady cash flows).

236. See *id.* (explaining how solar and wind's long-term power purchase agreements fit MLP's ideal model).

237. See *id.* (discussing solar and winds ideal fit for MLP model).

238. See Sherlock & Keightley, *supra* note 205, at 10 (describing policy concerns for extending MLPs to renewables).

239. See *id.* (highlighting some legislators' belief maintaining MLPs may not be sustainable).

240. See *id.* (discussing potential for corporate tax base erosion and lost federal government revenue).

241. See *id.* (providing Congress with opportunity to increase revenues by making all MLPs convert to corporations).

242. See *id.* (illustrating potential outcome of eliminating MLPs entirely).

243. See *Invest But Reform*, *supra* note 121, at 1-2 (discussing important reasons why renewables need MLPs to grow).

244. See *Exxon Mobil Corporation (XOM)*, YAHOO FIN., <http://finance.yahoo.com/q?s=XOM> (last updated Oct. 2, 2015, 4:00 PM) (showing how fossil fuel companies already have existing footprints in public capital markets). Fossil fuel companies have existing and strong footprints in public capital markets as demonstrated by Exxon Mobil's \$324 billion market capitalization.

Access to the MLP structure also offers the renewable energy industry more than just fundraising advantages.<sup>245</sup> It allows renewables to take on more projects around the country, aligning U.S. Tax Policy with U.S. Energy Policy.<sup>246</sup> In order for the U.S. to meet its long-term energy and environmental goals, it needs significant deployment of many more renewable projects; tax base erosion appears to be a reasonable price to pay.<sup>247</sup> The extension of the MLP structure allows more deployment of renewable energy capacity throughout the country, while subsequently weaning the U.S. off a severe fossil fuel addiction.<sup>248</sup>

The argument that renewables are not established enough to take advantage of MLPs has some validity, but not all renewables are created equal.<sup>249</sup> Wind and solar projects are proven, reliable assets capable of generating stable rates of return.<sup>250</sup> Furthermore, the less predictable renewables, such as harnessing ocean wave power, could become more predictable if they attract more capital; more capital inevitably leads to innovation and efficiencies in the marketplace.<sup>251</sup>

Finally, eliminating MLPs entirely seems like a sensible policy option because it can expand the U.S.' shrinking tax base.<sup>252</sup> This policy, however, is flawed because it stymies all U.S. energy development rather than promoting industry growth for renewables.<sup>253</sup> The U.S. needs more renewable energy capacity to improve the en-

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245. See *Invest But Reform*, *supra* note 121, at 3-4 (discussing advantages of allowing renewables to use MLPs).

246. See Joshua S. Hill, *U.S. & Brazil Pledge Jointly to Raise Renewable Energy to 20% by 2030*, CLEANTECHNICA (July 1, 2015), <http://cleantechnica.com/2015/07/01/us-brazil-pledge-jointly-raise-renewable-energy-20-2030/> (detailing U.S.'s commitment to further renewable energy development).

247. See *id.* (depicting U.S.'s lofty renewable energy goals); see also *Invest But Reform*, *supra* note 121 at 3-4 (discussing benefits MLPs can potentially bring to renewable energy). The hefty list of benefits MLPs can provide renewable energy development seems to outweigh the potential lost government revenue. See *Invest But Reform*, *supra* note 121 at 3-4.

248. See *Invest But Reform*, *supra* note 121, at 3-4 (detailing laundry list of benefits MLPs can bring renewables).

249. See Devetski & Moran, *supra* note 229 (explaining why solar and wind are better for MLPs than other renewable energy sources). Solar and wind fit the MLP model because each has a history of consistently producing long-term projects that produce steady and sustainable cash flows. *Id.*

250. See *id.* (confirming solar and wind's reliable asset class status).

251. See Sherlock & Keightley, *supra* note 205, at 10 (discussing how technology for harnessing ocean waves has not yet been tested).

252. See *id.* (discussing why Congress eliminating MLPs altogether might be good for shrinking U.S. federal tax base).

253. See *Invest But Reform*, *supra* note 121, at 3 (discussing why offering MLPs to renewables offers better policy options than eliminating MLPs entirely).

178 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

vironment and reach its federal renewable energy goals.<sup>254</sup> Eliminating the opportunity for fossil fuel companies to take advantage of the MLP structure may level the playing field for both types of energy development, however, it does not help renewable energy's fundraising problems.<sup>255</sup> Keeping MLPs from renewable projects continues the existing problems because financial capital would still be hard to acquire.<sup>256</sup> Renewable energy deserves a better answer.<sup>257</sup> Considering the concern for fossil fuels, Congress should allow renewables to take advantage of MLPs to promote growth of the renewable energy industry around the country.<sup>258</sup>

## VI. IMPACT

Extending MLPs to renewable energy would help the U.S. as a whole, as well as individual states, meet renewable energy goals.<sup>259</sup> Currently, most states have a renewable portfolio standard (RPS) in place, requiring state energy providers to use a specified percentage of renewable energy in their energy supply mix, or risk a fine.<sup>260</sup> RPS requirements vary considerably across states, depending upon how aggressive the state is in achieving its goals.<sup>261</sup> Each year, nev-

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254. *See id.* (discussing U.S.'s need for more renewable energy); *see also* Office of the Press Secretary, *Presidential Memorandum—Federal Leadership on Energy Management*, WHITE HOUSE (Dec. 5, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/05/presidential-memorandum-federal-leadership-energy-management> (discussing federal government's leadership role in renewable energy policy).

255. *See Invest But Reform, supra* note 121, at 1-2 (discussing why eliminating MLPs altogether would be ineffective in promoting renewable energy development).

256. *See id.* (highlighting how renewable projects are still desperate for capital).

257. *See id.* (emphasizing that renewable energy needs better answers and MLPs can help).

258. *See id.* (providing Congress should give renewables access to MLPs like they gave to individual investors with REITs).

259. *See Most States Have Renewable Portfolio Standards*, U.S. ENERGY INFO. ADMIN. (Feb. 3, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=4850> (discussing how most states require renewable energy generation); *see also* Hill, *supra* note 246 (highlighting federal government's renewable energy goals).

260. *See Most States Have Renewable Portfolio Standards, supra* note 259 (explaining renewable portfolio standards); *see also Alternative Compliance Payment Rates*, MASS.GOV, <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/rps-aps/retail-electric-supplier-compliance/alternative-compliance-payment-rates.html> (last visited Sept. 24, 2015) (discussing alternative compliance payments). In a state with a renewable portfolio standard (RPS), an energy supplier can supply electricity from a renewable source, purchase another renewable developer's generation through renewable energy credits, or pay an alternative compliance payment set by the state. *Id.* Electricity providers have their choice among the above options. *Id.*

261. *See Renewables Portfolio Standard*, DSIRE <http://programs.dsireusa.org/system/program/detail/840> (last updated Feb. 4, 2015) (providing California's

ertheless, all states with RPSs increase the amount of its energy supply that must consist of renewables.<sup>262</sup>

States have varying RPS goals that are partially the result of geography.<sup>263</sup> For example, California has a substantially more aggressive RPS goal than Ohio, due in part to its greater supply of natural resources.<sup>264</sup> Additionally, state RPS goals vary due to state-level politics and the different strategies employed to financially support renewables.<sup>265</sup> Renewables are an easier sell in some states than in others.<sup>266</sup> For instance, California's strong support of renewables has public backing and utilizes taxpayer funds in reaching its RPS goals.<sup>267</sup> Other states are not as willing to allocate large portions of their budgets for renewables.<sup>268</sup>

If Congress extends MLPs to renewables, it would be easier for all states to meet and increase their RPS goals, regardless of the varying political climate.<sup>269</sup> MLP financing would make it easier for

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RPS statistics). In California, energy providers must have 33% of all electricity provided come from renewable sources by 2020. *Compare id.; with Alternative Energy Portfolio Standard*, DSIRE, <http://programs.dsireusa.org/system/program/detail/2934> (last updated July 24, 2014) (providing Ohio's RPS statistics). In Ohio, electric utilities must provide 12.5% of their electric generation from renewable sources by 2026. *Id.*

262. *See Renewables Portfolio Standard*, *supra* note 261 (showing each state's annual RPS implementation standard).

263. *See id.* (detailing California's drastic RPS standard).

264. *See id.* (demonstrating California's aggressive RPS); *see also* Mike Gaworecki, *California Governor Proposes Most Ambitious Renewable Energy Target in U.S.*, DESMOG (Jan. 6, 2015, 4:00 AM), <http://www.desmogblog.com/2015/01/06/california-sets-ambitious-new-renewable-energy-target> (explaining reasons why one state might have more aggressive RPS goals than another).

265. *See California Financial Incentives*, DATABASE OF ENERGY EFFICIENCY, RENEWABLE ENERGY, <http://programs.dsireusa.org/system/program?state=CA> (last visited Sept. 24, 2015) (offering all state's incentives for renewables). California offers many financial incentives for renewable technology to achieve their renewable goals including an expensive self-generation incentive program and California sponsored solar-photovoltaic incentives. *Id.*

266. *See* Gaworecki, *supra* note 264 (discussing citizens' ability to impact renewable energy policies). California citizens' great support of progressive renewable energy policies makes it easier for state lawmakers to pursue aggressive renewable energy goals. *See id.* (explaining how California citizens' political will makes it easier for its Governor to pursue renewable energy goals).

267. *See id.* (discussing how California's people like to be leaders in confronting environmental problems such as global warming).

268. *See Voluntary Renewable Portfolio Goal*, DSIRE, <http://programs.dsireusa.org/system/program/detail/2528> (last updated Feb. 8, 2015) (offering statistics about Virginia's voluntary RPS standard). Virginia has implemented a voluntary RPS with no state-level financial support. *Id.* For a discussion of California's mandatory and subsidized program, *see Renewables Portfolio Standard*, *supra* note 261.

269. *See Invest But Reform*, *supra* note 121, at 3-4 (discussing why federal MLPs would make renewable project finance easier in all states).



180 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 149

states to meet their respective RPS goals because renewables would require less financial support from the state.<sup>270</sup> MLPs allow renewables to secure funding through public capital markets rather than relying on state and federal subsidized programs.<sup>271</sup> Capital attraction features of MLPs would also drive down renewable project costs, making it easier for state politicians to pursue aggressive RPS goals.<sup>272</sup> State politicians, therefore, would have an easier time promoting state RPS goals because they would no longer need to substantially rely on taxpayer funds.<sup>273</sup> Congress should extend MLPs to renewables and enhance the U.S.' ability to use renewable energy forevermore.<sup>274</sup>

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270. *See id.* (explaining how MLPs would lessen need for state-level tax credits). Federal MLPs would broaden renewables' capital access and make state financial support less determinative in renewable project outcomes. *Id.*; *see also* Peter Danko, *State Renewable Energy Rankings Place California in the Top Spot*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/03/02/state-renewable-energy-rankings\\_n\\_1316647.html](http://www.huffingtonpost.com/2012/03/02/state-renewable-energy-rankings_n_1316647.html) (last updated Mar. 3, 2012, 10:46 AM) (discussing California as leader for renewable energy).

271. *See Invest But Reform, supra* note 121, at 3 (explaining benefits of MLPs and how they can promote renewable energy development across U.S.).

272. *See id.* (emphasizing ability of MLPs to lower capital costs).

273. *See id.* (discussing capital attraction features MLPs provide).

274. *See id.* (explaining benefits MLPs could provide to renewable energy).

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