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Rebekah M. Gryder
Alexander Blewett III School of Law at the University of Montana, rebekah.gryder@gmail.com

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COMMENTS

MASTER LIMITED PARTNERSHIPS: A STEP IN THE RENEWABLE DIRECTION

Rebekah M. Gryder*

I. INTRODUCTION

The energy industry is one of the most heavily subsidized industries in America.[1] Since the industrial revolution, the United States has largely relied on fossil fuels to generate power. However, spurred by concerns over climate change and pollution, as well as advances in technology, the energy market is moving away from fossil fuels and toward renewable sources of energy. According to the 2017 United States Energy and Employment Report, employment in clean energy and energy efficiency is growing faster than employment in fossil fuels.[2] The scientific community agrees that burning fossil fuels is the largest contributor to human-caused climate change.[3] Scientists and economists estimate that the effects of climate change—which include increases in extreme weather patterns such as hurri-

* Candidate for J.D. 2020 at the Alexander Blewett III School of Law at the University of Montana. Thank you to Professor Sam Panarella for his mentorship, insight, and guidance through the writing process. Thank you to my friends and peers, the editors and staff of the *Montana Law Review*, for their editorial work. Lastly, a huge thank you to my friends and family for their endless encouragement, love, and support.

1. Ilaria Espa & Sonia E. Rolland, *Subsidies, Clean Energy, and Climate Change*, E15 TASK FORCE ON RETHINKING INT'L SUBSIDIES DISCIPLINES, 3 (2015). Fossil fuels receive an average of $400 to $600 billion annually. *Id.*

2. *U.S. Energy and Employment Report*, DEPARTMENT OF ENERGY, 8–9 (Jan. 2017), https://perma.cc/4QSR-3K5T.

3. Daniel B. Botkin, *Global Warming: What It Is, What Is Controversial About It, and What We Might Do In Response to It*, 9 UCLA J. ENVTL. L. & POL'Y 119, 121 (1991).

canes, polar vortexes, and rising sea levels—will cost the United States' economy billions of dollars annually.[4]

While the science surrounding climate change is clear,[5] the politics and policies associated with the energy industry are muddy at best. Fossil fuel companies spend millions of dollars annually on lobbying efforts, and, consequenetly, politicians are sharply divided on how the energy industry should develop and adapt to advances in science and technology.[6] Regulation of the energy industry is, and has always been, a politically contentious issue. Throughout his campaign and tenure in the Oval Office, President Trump has touted bringing back *clean coal* and pushed for the reopening and resurgence of the American coal industry.[7] However, the scientific community agrees that burning coal is one of the primary contributors to human-caused climate change.[8]

Nevertheless, most conservatives believe the abundance of fossil fuels in America's bedrock should be tapped and sold on the international market to provide a major source of revenue and to encourage energy independence.[9] Liberals, on the other hand, remain focused on the looming threat of climate change. While in office, President Obama was key in the United States' participation in major international energy cooperatives, like the Paris Agreement—which President Trump almost immediately withdrew from.[10] In 2018, freshman House Democrat Alexandria Ocasio-Cortez introduced the highly controversial *Green New Deal*, which aims to reduce the United States' use of fossil fuels and create high-paying clean energy jobs.[11] Despite, or perhaps because of polarized visions on regulation of the energy industry, fossil fuels enjoy the greatest amount of indirect and direct

4. Andrea Thompson, *Here's How Much Climate Change Could Cost the U.S.*, SCI. AM. (Dec. 3, 2018), https://perma.cc/B428-QP3T.

5. Scientists largely agree that the Earth is warming at a rate higher than normal because of human activity. Thomas J. Crowley, *Causes of Climate Change over the Past 1000 Years*, SCI. 289, 270–75 (Jul. 14, 2000). Scientists also agree that burning fossil fuels that emit greenhouse gases is causing the warming. *Id.*

6. Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying on Climate Change in the USA, 2000 to 2006*, CLIMATIC CHANGE 149 (2018). The politics behind purchasing natural resources are very complicated, mostly because the Middle East is currently one of the largest suppliers of oil. U.S. Energy Information Administration, *Oil: Crude and Petroleum Products Explained*, EIA.GOV, https://perma.cc/3T25-C8UA (Last visited, Jan. 2, 2020).

7. Meghan Keneally, *What Trump Has Said About Clean Coal and What It Is*, ABCNEWS (Aug. 23, 2017), https://perma.cc/D89Q-VC8B.

8. Crowley, *supra* note 5, at 270–75. R

9. Victor Davis Hanson, *The Fracking Industry Deserves Our Gratitude*, THE NAT'L REVIEW, https://perma.cc/R68A-RGXJ (last visited Apr. 14, 2019).

10. Camila Domonoske, *So What Exactly Is In the Paris Climate Accord?* NAT'L PUB. RADIO (June 1, 2017), https://perma.cc/6FYC-69KG.

11. H.R. Res. 109, 116th Cong. (2019). Notably, this legislation is merely a resolution and makes no changes to existing law.

subsizization[12] from the United States government and remain dominant in the energy market.[13]

One significant financial benefit fossil fuel companies enjoy is their ability to organize as Master Limited Partnerships. The Master Limited Partnership ("MLP") is an entity structured as a limited partnership that can trade ownership units on a national stock exchange.[14] Yet, the entity is not subject to corporate taxation treatment like all other publicly-traded entities, which means it only pays taxes at the ownership level rather than at both the entity and ownership level.[15] By imposing limits through the Internal Revenue Code ("IRC"), Congress primarily allows fossil fuel companies to reap the benefits of the MLP structure.[16] The result is an indirect subsidy, which, among many other existing subsidies, allows fossil fuel companies to dominate the energy sector.[17] In recent years, Congress has considered a bill, the Master Limited Partnership Parity Act ("MLPPA"), that would allow renewable energy companies to also obtain MLP tax treatment.[18] However, this legislation, as written, is nothing more than a starting place for Congress. If the United States is ever going to adequately address climate change, the renewable energy industry should, at a minimum, be afforded the same benefits and opportunities as other competitors in the market. Additionally, Congress should even consider eliminating the use of the MLP by fossil fuel companies to shift the energy market in favor of renewables.

Montana could benefit significantly from investment in the renewable energy industry.[19] In Montana, the renewable energy sector is growing rap-

12. *Fact Sheet: Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs*, Envtl. and Energy Study Inst. (Jul. 29, 2019), https://perma.cc/DX5Z-S2LU. Direct subsidies include: Intangible Drilling Costs Deduction (I.R.C. § 263), Percentage Depletion (I.R.C. § 613), and credits for clean coal investment (I.R.C. § 48A).

13. U.S. Energy Information Administration, *Monthly Energy Review February 2019*, figure 1.2, 4.1; Espa & Rolland *supra* note 1, at 1. **R**

14. Suzanne B. Sutton, *Tax Reform 1986 Fuels the Rise of the Master Limited Partnership*, 9 U. Bridgeport L. Rev. 217, 218–19 (1988).

15. *Id.* at 220–22.

16. *See* I.R.C. § 7704 (2018); Sutton, *supra* note 14, at 220–22. **R**

17. *See* Espa & Rolland *supra* note 1, at 3. **R**

18. *See* Master Limited Partnerships Parity Act, S. 2005, 115th Cong. (2017).

19. Currently, Montana's major coal-fired electricity plant, Colstrip, is set to close down half its units by the end of 2019. Corin Cates-Carney, *Colstrip Power Plant Units 1 and 2 To Close This Year*, Mont. Pub. Radio (Jun. 11, 2019) https://perma.cc/8JGD-DERG. Further, it is estimated that the remaining units will close in the next ten years. *Colstrip Part Owner Moves Up Timetable to Drop Power Plant*, Q2 News (Oct. 3, 2019), https://perma.cc/FR4Y-DRY4. The reason for these closures is because PacifiCorp, a part-owner of the plant, has made commitments to move towards renewable energy. *Id.* Renewable energy proponents in Montana say that Colstrip's closure will open up more space on existing power lines to transmit more wind power to Washington and Oregon. Cates-Carney, *supra* note 19. **R**

idly and is quickly becoming a major industry for the state.[20] Specifically, Montana's geography makes it a leading state in wind energy potential.[21] Currently, there are around 500 commercial wind turbines in Montana, as well as a number of projects set for development in the next few years.[22] Montana also has 23 utility-grade hydroelectric power plants.[23] Development of more renewable energy projects could boost Montana's economy and become a major source of industry in the state.

This comment explores MLPs in their role as a fossil fuel industry subsidy and their possible use to spur growth and development in the renewable energy sector. Part II of this comment explores the historic and contemporary structure and purpose of the MLP, focusing on how the MLP is advantageous from a tax and capital-raising perspective. Part III analyzes the proposition that renewable energy companies should be allowed to organize as an MLP, including the proposed MLPPA and its possible effects on the energy sector. Finally, I propose that renewable energy production and storage companies be allowed to organize as MLP's and that fossil fuel companies be phased out of the MLP structure via individual plans.

Together, these small changes to the IRC supply a market-based approach that could help the United States move towards creating a more sustainable energy sector. Importantly, the MLP structure is merely a piece of the energy market in the United States, and any changes to existing law are unlikely to cause major shifts in that market. Therefore, the proposal this comment utlimately advances is unlikely to *solve* the issue of climate change alone, and the United States will need to consider more impactful legislation to if it is to curb the emission of greenhouse gases and fend off the dangers presented by climate change. Nontheless, the MLP remains an effective energy subsidy that could encourage a market shift away from fossil fuels and towards renewable energy.

II. The Evolution and Purpose of the Master Limited Partnership

Business owners choose between a variety of organizational structures when forming their business. The two primary organizational structures that energy companies can choose between are corporations and limited partner-

20. *Montana State Profile and Energy Estimates*, U.S. Energy Info. Admin. (Dec. 20, 2018), https://perma.cc/JR35-VA88.

21. *Id.*

22. *Id.*

23. *Id.*

ships.[24] The corporate structure is ideal for raising low-cost capital, as corporations can easily sell ownership shares and may eventually trade on the national market. However, the IRC subjects corporate entities to taxation at two levels.[25] First, the IRC assesses tax at the entitiy level on a corporations net profits.[26] Second, the corporation's shareholders pay tax, often at preferential rates, on their dividends and appreciation in value upon sale.[27] The result is two levels of taxation on entities organized as corporations.

Limited partnerships, on the other hand, pay income tax only at the investor or limited partner level.[28] Rather than paying a corporate income tax, limited partnerships pass their income directly to their investors or limited partners, which is commonly referred to as *pass-through* taxation.[29] By avoiding the entity-level taxes assessed on corporations, pass-through taxation provides significant savings for the organization (and greater profits for the organization's owners and investors).[30] While most limited partnerships are not publicly traded companies, some do trade ownership units on national stock exchanges. But in taking advantage of whatever benefits national stock exchanges provide, limited partnerships remain subject to entity-level taxation—unless they qualify as an MLP.[31]

Congress did not create the first MLP; rather, clever corporate lawyers looking to decrease their tax liability and create greater returns on investment did. The Apache Petroleum Company ("Apache"), an independent oil and gas producer, created the first MLP when it consolidated its drilling operation partnerships in 1981.[32] This was, in part, a result of the Economic Recovery Act of 1981 increasing the corporate tax rates, making them less favorable than pass-through tax rates.[33] As a result, it became more beneficial for investors to pay ordinary income tax rates assesed on pass-through entity ownership rather than corporate income taxes at the entity level, then capital gains rates on the appreciation of shareholder value at the investor

24. David C. Magagna, *Congress, Give Renewable Energy a Fair Fight: Passage of the Master Limited Partnership Parity Act Would Give Renewable Energy the Financial Footing Needed to Independently Succeed*, 27 VILL. ENVTL. L.J. 149, 154–55 (2016).

25. I.R.C. § 11(a); FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 6953. (WESTLAW 2019).

26. I.R.C. § 301.

27. *Id.* For most stock in publicly-traded companies, shareholders pay capital gains rates on both dividends and appreciation in value upon sale. Dividends that get this preferential treatment are called *Qualified Dividends*. For a more robust discussion of qualified vs. ordinary dividends see *Investment Income and Expenses* I.R.S. Pub. 550 (2018).

28. I.R.C. § 701.

29. *Id.*

30. *Id.*

31. *Id.* § 7704.

32. Apache Corp., *About Apache—1980s*, APACHECORP.COM, https://perma.cc/3S5Q-ACD5 (last visited Mar. 13, 2019).

33. Pub. L. No. 97-34, 95 Stat. 172 (1981).

level.[34] Under this structure, Apache could take advantage of the capital raising and liquidity benefits of being publicly traded while maintaining a pass-through partnership taxation structure.[35] Thus, taking into account the taxation methods, their investors had greater returns on investment. Following in Apache's footsteps, several corporations began to reorganize as MLPs, including hotels, sports teams, and amusement parks.[36]

In 1987, Congress placed severe restrictions on what kind of companies could organize as an MLP, citing concerns that companies might use the structure to avoid corporate taxes.[37] Congress thus enacted I.R.C. § 7704, which treats publicly-traded partnerships and their investors as corporations for tax purposes, resulting in the assessesment of normal corporate income taxes.[38] However, Congress created several exceptions that allow most publicly-traded fossil fuel limited partnerships to maintain pass-through taxation. These entities are today's MLPs, a function of I.R.C. § 7704(c).[39] Under subsection (c), the corporate treatment of publicly-traded partnerships does not apply if 90% of their income meets the definition of "qualifying income" under the statute.[40] "Qualifying income" is defined as income and gains derived from a variety of natural resource-related sources, including many of the activities in which fossil fuel companies engage.[41] The result is significant tax savings combined with a public-ownership structure.

The MLP combines the capital-raising advantages of a corporation with the tax benefits of a limited partnership. Structurally, an MLP is a

34. Here, it is crucial to take into consideration the various level and rates of taxation that are at play. Corporate shareholders are taxed at capital gains rates on their shareholder interests, while partnership interests are taxed at income tax rates. I.R.C. § 1(h)(1). When corporate tax rates are very low, investors and entities are subjected to less taxation when calculating the total taxes paid at both levels.

35. Matthew J. McCabe, *Master Limited Partnerships' Cost of Capital Conundrum*, 17 U. PA. J. BUS. L. 319, 322 (2014). Apache combined thirty drilling limited parnerships, and each of the limited partnerships contributed all their interests into the MLP and received a limited partnership interest in the MLP. *Id.*

36. *Id.* at 160.

37. H.R. 3545 100th Cong. (1987); Omnibus Budget Reconciliation Act, Pub. L. No. 100-203, 101 Stat. 1303, § 10211 (1987); E. Cabell Massey, *Master Limited Partnerships: A Pipeline to Renewable Energy Development*, 87 U. COLO. L. REV. 1009, 1014 (2016).

38. I.R.C. § 7704(a). The general rule under 7704(a) provides that "a publicly traded partnership shall be treated as a corporation," except as provided for in subsection (c)—which is the applicable statute that creates the Master Limited Partnership.

39. *Id.* § 7704(c), (d).

40. *Id.* § 7704(c)(1)-(2).

41. *Id.* § 7704(c)(2). The qualifying income statute specifically includes: "income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber), industrial source carbon dioxide, or the transportation or storage of any fuel described in subsection (b), (c), (d), or (e) of section 6426, or any alcohol fuel defined in section 6426(b)(4)(A) or any biodiesel fuel as defined in section 40A(d)(1)." *Id.* § 7704(d)(1)(E).

limited partnership, which requires a general partner to own at least two percent of the business and be personally liable for its obligations.[42] Limited partners can invest in the company and receive what are called "common units," but they are only liable for the company's obligations to the extent of their investment.[43] Most importantly, investors can trade common units on national exchanges like corporations can with shares, and the investors pay ordinary income taxes on the appreciation and returns on ownership.[44] As discussed above, the largest advantage of existing as a limited partnership is that MLPs do not pay entity-level income taxes.[45] As a result of lower tax liability, most MLPs have the liquidity to consistently pay dividends to their investors and to produce steady returns on investments, giving the entity a broader investment pool as unit holders are sure to benefit from their ownership in immediate returns.[46]

Often, MLPs act as holding companies for oil and gas extraction projects.[47] In other words, developers will sell their already operational projects to an MLP that owns several other projects. Because of the capital-raising benefits of the MLP, these entities have more working capital to purchase projects with, and developers can sell operational projects and use the funds to develop even more projects. In short, the advantages resulting from fossil fuel companies' ability to organize as an MLP cannot be understated. Congress' acquiseance to fossil fuel companies organizing as MLPs constitutes an explicit subsidy unavailable to renewable energy companies.The result, is an energy market skewed towards fossil fuel companies. In the following section, this comment advocates for a solution in which renewable energy companies can avail themselves to the MLP structure.

III. Improving the Chances of Renewables in the Energy Market

Incentives provided to renewable energy companies generally pale in comparison to the advantages enjoyed by fossil fuel companies through the MLP structure.[48] At the time of the 1987 MLP reform, Congress did not sufficiently appreciate renewables as a major source of energy in the United

42. Magagna, *supra* note 24, at 158 n.80. Generally, the general partner in an MLP is some organization or corporation—it is unusual that an individual would be named as the general partner. McCabe, *supra* note 35, at 323. **R** **R**

43. McCabe, *supra* note 35, at 323–24. Common units are the equivalent of stock in a C corporation. **R**

44. Robert J. Haft, Peter M. Fass, Michele Haft Hudson, & Arthur F. Haft, Tax-Advantaged Securities § 10:473 (Westlaw 2019).

45. I.R.C. § 7704(c)(1).

46. Magagna, *supra* note 24, at 149. **R**

47. *See* McCabe *supra* note 35, at 326. **R**

48. Magagna, *supra* note 24, at 149. **R**

States.[49] As a result, fossil fuel MLPs pay significantly less in taxes than publicly-traded renewable energy corporations. Further, fossil fuel companies are rarely held financially responsible for climate change and its devastating effects on the economy and environment, despite the direct correlation between burning fossil fuels and climate change.[50]

This explicit subsidization from the United States government, as well as a lack of financial accountability, renders fossil fuel companies a better investment with less financial downside when compared to a renewable energy company. Moving forward, Congress should rely on the renewable energy industry to spur United States economic competition and development in the global energy sector while curbing the effects of climate change. As taxpayers will primarily bear the costs associated with climate change, the United States can no longer afford to exempt fossil fuel companies from entity-level taxation. Congress should begin phasing fossil fuels out of the MLP structure, and instead allow renewable energy companies to take advantage of it.

Although renewable energy companies receive tax benefits of their own, they miss out on one significant advantage the MLP structure grants fossil fuel companies—better opportunities to raise capital. Renewable energy companies are allowed tax benefits via the Production Tax Credit ("PTC"), Investment Tax Credit ("ITC"), and accelerated depreciation.[51] The PTC is a program that offers tax credits for renewable energy generation based on a per kilowatt-hour production.[52] The ITC is a tax credit for qualifying costs that renewable energy projects are eligible for as soon they begin commercial operations.[53] However, tax credits are only advantageous if a company already has the tax liability to offset the applicable credits. On average, renewable energy companies take around ten years to recover their expenditures and actually use the PTC or the ITC to reduce their tax liability.[54] Further, the ITC and PTC are set to phase out significantly by 2021.[55]

49. *Id.*

50. Douglas Starr, *Just 90 Companies are to Blame for Most Climate Change, this 'Carbin Accountant' Says*, SCIENCE MAGAZINE, https://perma.cc/6ML4-AA6U (Aug. 25, 2016). In other words, most energy companies are not held responsible for the harm that emitting greenhouse gases into the atmosphere causes. In response to this, some legislators have proposed a "carbon tax" that taxes a company's emissions. Amy C. Christian, *Designing a Carbon Tax: The Introduction of the Carbon-Burned Tax (CBT)*, 10 UCLA J. ENVTL. L. & POL'Y 221 (1992).

51. Massey, *supra* note 37 at 1026–27.

52. I.R.C. § 45. Further Analysis of the IRC. *See also* Mitchell Menaker, Derek Kershaw, Simon Letherman, Iain Scoon, *Clean Energy Sector Tax Incentives in the US and UK*, 23 INT' L TAX REV. 47 (2012).

53. I.R.C. § 48. The Investment Tax Credit allows a credit for any taxable year and is the *energy percentage* of the basis of each energy property that was placed into service during that taxable year. Generally, 30% of the energy property qualifies. *Id.* § 48(a)(3).

54. Massey, *supra* note 37, at 1027.

55. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 40409, 132 Stat. 64, 150 (2018).

Renewable energy companies experience similar tax liability problems with accelerated depreciation.[56] Taking greater depreciation deductions does little to help renewables raise capital when their tax liability is likely unable to support the deductions until well into the life-cycle of a project.[57] While these tax-equity investment programs are undoubtedly beneficial, they do not provide the ability to secure low-cost capital like the MLP structure does by promoting public investment.[58]

A. *Renewables in the Current Market*

The renewable energy market has seen significant growth in the past few decades.[59] In fact, the global renewable energy market is poised to grow at 8.53% between 2019 and 2027.[60] Like any business, however, securing funding to initiate a project or development poses major challenges. Typically, renewable companies will set up a network of single project entities, then sell them to holding companies after they become operational.[61] One popular vehicle for this structure is the limited liability company, which allows projects to obtain nonrecourse debt from banks and institutional lenders while maintaining pass-through taxation.[62] Nonrecourse debt acts like a traditional loan from a bank or financial institution that shields the borrower from having any personal liability for repayment.[63] In other words, the organization itself is liable for the debt, and the person or organization who owns the company is generally not liable for the company's financial obligations.

In reality, most projects do not secure funding through a single type of financing. Many large-scale projects are financed by a mixture of nonrecourse debt and equity investors, who provide funding and receive ownership shares in return.[64] Due to the nature of renewable energy projects, some renewable company investors supply capital solely for tax equity, which allows the investor to take advantage of a company's otherwise un-

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56. Magagna, *supra* note 24, at 164. R
57. *Id.*
58. *Id.*
59. Dr. Faith Birol, *Renewables 2018: Market Analysis and Forecast 2018 to 2023*, INTERNATIONAL ENERGY AGENCY, (last visited Mar. 7, 2019).
60. *Renewable Energy Market: 2019 Size, Potential Growth, Trends, Share Analysis, Regional Outlook, Sales, Revenue, Which Global Industry Forecast to 2027*, MARKETWATCH (May 2, 2019), https://perma.cc/L5YK-NZVC.
61. Richard L. Ottinger & John Bowie, *Innovative Financing for Renewable Energy*, 32 PACE ENVTL. REV. 701, 742 (2015).
62. I.R.C. § 701; Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 442 (1991).
63. *Nonrecourse Loan*, BLACK'S LAW DICTIONARY (10th ed. 2014).
64. Brian H. Potts, *Tax Equity Financing for Utilities: Another Helping of Renewable Energy, But Hold The Tax Credits*, FORBES (Jul. 18, 2018), https://perma.cc/3L2F-YXNC.

used tax credits.[65] Tax equity investors are typically large corporations with sizeable taxable incomes looking to take advantage of tax credits or deductions they would otherwise not be entitled to.[66]

Currently, some renewable developers and companies have created what is referred to as a YieldCo.[67] A YieldCo is a publicly traded corporation that owns and operates solar and wind projects.[68] A YieldCo and an MLP serve similar purposes structurally. Much like the MLP, renewable energy project developers will sell their operational projects to YieldCo companies, which allows the developer to use the sale proceeds to fund further projects.[69] However, YieldCos operate at a disadvantage to fossil fuel MLPs for several reasons. Most critically, they are subjected to increased tax liability. Like any other corporation, YieldCos pay taxation at the entity and investor levels.[70]

For example, SolarCity, a publicly-traded corporation that manufactures and installs solar panels, has a similar market capitalization to Midstream, a fossil fuel MLP.[71] At its initial public offering, Midstream raised $920 million, before subsequently investing those funds in crude oil pipelines.[72] However, as a result of Midstream's MLP structure, these two companies enjoy starkly different investment profiles.[73] SolarCity pays corporate taxes and does not pay cash dividends on its stock, partly as a result of its additional tax liability. Midstream, on the other hand, pays dividends to its limited partners yearly.[74]

As a result, Midstream remains the obvious choice for investors looking to receive annual dividends. Therefore, if SolarCity had the same MLP structure, it would theoretically be a viable investment alternative to Midstream, while also generating capital for even more renewable energy ventures. The comparison between Midstream and SolarCity illustrates how Congress could spur investment in renewables by expanding the MLP structure to include companies in the renewable energy generation and storage industry. Some members of Congress have taken note of this, and on a four separate occasions, have introduced the MLPPA, which would allow

65. *Id.*
66. *Id.*
67. Ottinger & Bowie, *supra* note 61, at 742. **R**
68. *Id.*
69. *Id.*
70. I.R.C. § 11.
71. Magagna, *supra* note 24, at 152. **R**
72. *Id.*
73. *Id.*
74. *Id.*

renewable energy companies to organize as MLPs.[75] Unfortunately, it has never reached a full vote in either chamber of Congress.[76]

Legislation supporting renewable energy companies inevitably faces an uphill battle and strong opposition from well-connected fossil fuel lobbyists on Capitol Hill. Unsurprisingly, not all members of Congress believe that the MLP should be expanded to include renewable energy companies.[77] Some members of Congress argue that sufficient tax subsidies already exist for renewables.[78] As such, allowing renewables to organize as MLPs would further decrease the amount of tax the renewable energy industry contributes to the United States tax base and serve to increase the deficit.[79] The Joint Committee on Taxation reported that the MLPPA would cost the federal government $1.3 billion over ten years; for context, the 2019 budget alone is around 4.4 trillion dollars.[80]

It must be noted, however, that these numbers pale in comparison to the costs associated with climate change. The Environmental Protection Agency and other federal agencies use the "Social Cost of Carbon" as a policy tool to attach a dollar figure to costs associated with the burning of fossil fuels.[81] Essentially, it "is a measure, in dollars, of the long-term damage done by a ton of carbon dioxide (CO2) emissions in a given year."[82] Generally, the cost increases over time as the effects of climate change worsen.[83] The Congressionally-mandated National Climate Assessment Report currently estimates that climate change will cost the United States' economy half of a trillion dollars *annually* by 2090.[84]

Despite the immense costs of climate change, the MLPPA is mostly unpopular with fiscal conservatives, who claim to have a careful eye on the ever-expanding national deficit.[85] Further, there are significant political

75. *See* Master Limited Partnerships Parity Act, S. 3275, 112th Cong. (2012); Master Limited Partnerships Parity Act, S. 795, 113th Cong. (2013); Master Limited Partnerships Parity Act, S. 1656, 114th Cong. (2015); Master Limited Partnerships Parity Act, S. 2005, 115th Cong. (2017).

76. Master Limited Partnerships Parity Act, S. 2005, 115th Cong. (2017).

77. The MLPPA has been introduced four times but has never left committee. Dino Grandoni, *The Energy 202: Tax Debate Opens Door For Renewables to Get Same Break As Fossil Fuels*, The Washington Post (Oct. 25, 2017), https://perma.cc/29VC-A2J6.

78. *Id.*

79. Currently, renewable energy companies that could organize as MLPs are organized as YieldCos, which pay corporate taxes. Therefore, should a YieldCo reorganize as an MLP, that company would no longer pay such taxes, resulting in the Treasury taking in less tax revenue.

80. *Id.*

81. *The Social Cost of Carbon*, United States Environmental Protection Agency, https://perma.cc/SJ78-RF9S (last visited Sept. 20, 2019).

82. *Id.*

83. *Id.*

84. *Fourth National Climate Assessment*, U.S. Global Change Research Program (2018), https://perma.cc/RGW9-MLV4.

85. Grandoni, *supra* note 77. Of note, these fiscal conservatives have largely ignored the deficit since President Trump was elected in 2016. Indeed, the Tax Cuts & Jobs Act, passed with overwhelming R

consequences associated with legislation-based investments in renewable energy.[86] Fossil fuel companies spend millions on lobbying efforts and electioneering, and thus are significantly more established and successful policy influencers.[87] In 2016, oil and gas companies contributed $103 million for electioneering and $120 million on lobbying efforts.[88] Renewables, however, spent only $4.7 million in electioneering and $20.9 million on lobbying.[89] Like any newcomer, renewables simply do not have the same kind of stronghold in Washington, nor do they have as many allies in Congress.[90] This creates a massive hurdle for meaningful legislation aimed at creating a better renewable energy market.

Despite pushback from special interest groups and fossil fuel companies themselves, renewables are on the rise in the world market and remain an important topic of discussion between world leaders.[91] The 2015 Paris Climate Accord ("Paris Accord") is an international cooperative aimed at reducing greenhouse gas emissions and preventing the global temperature increase from exceeding 2 degrees Celsius above pre-industrial temperatures.[92] Currently, 187 parties have ratified the Paris Accord (including Germany and the United States), all of whom agreed that climate change poses a major threat to the modern world.[93] Germany is considered one of the world's biggest renewable energy leaders. During one week in March 2019, renewable energy powered nearly 65% of the country's electricity.[94]

Republican support in 2017, is estimated to expand the nationl deficit by $1,456 billion over the period from 2018 to 2027. *Congressional Budget Office Cost Estimate: H.R. 1*, CONGRESSIONAL BUDGET OFFICE, https://perma.cc/2QZU-3K3J (last visited Jan. 24, 2020).

86. For example, the fossil fuel industry spends millions of dollars on lobbying on the issue of climate change. Additionally, 87% of political election spending by the fossil fuel industry has gone to Republican candidates. OpenSecrets.org: The Center for Responsive Politics, *Oil & Gas: Long-term Contribution Trends*, OPENSECRETS.ORG, https://perma.cc/8U2J-2B2L (last visited Mar. 18, 2019).

87. Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 CLIMATE CHANGE 289 (2018); OpenSecrets.org: The Center for Responsive Politics, *supra* note 86.

88. OpenSecrets.org: The Center for Responsive Politics, *supra* note 86; OpenSecrets.org: The Center for Responsive Politics, *Oil & Gas: Lobbying*, OPENSECRETS.ORG, https://perma.cc/FN32-9QAR (last visited Mar. 18, 2019).

89. OpenSecrets.org: The Center for Responsive Politics, *Alternative Energy Production & Services: Long-Term Contribution Trends*, OPENSECRETS.ORG, https://perma.cc/6DGR-QD2N (last visited Sept. 10, 2019); Opensecrets.org: The Center for Responsive Politics, *Alternative Energy Production & Services: Lobbying*, OPENSECRETS.ORG, https://perma.cc/D3VK-VB86 (last visited Sept. 10, 2019).

90. OpenSecrets.org: The Center for Responsive Politics, *supra* note 89. **R**

91. *Global Renewable Energy Market Set to Grow as Traditional Energy Sources Dwindle*, FINANCIALBUZZ.COM (Sept. 24, 2018), https://perma.cc/D548-DYSC.

92. Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16–1104 (entered into force Nov. 4, 2016) [hereinafter Paris Accord].

93. *Id.*; *Paris Agreement: Status of Ratification*, UNITED NATIONS: CLIMATE CHANGE, https://perma.cc/49NW-WL36 (Last Visited Jan 2, 2020).

94. Tony Webster, *Renewables Generated a Record 65 Percent of Germany's Electricity Last Week*, YALEENVIRONMENT360 (Mar. 13, 2019), https://perma.cc/WGK6-CSLE.

These staggering numbers are in part due to Germany's focus on creating a robust renewable energy sector.[95] Although the United States has begun the process of withdrawing from its promises under the Paris Accord, other countries are stepping up to achieve its goals.[96] If the United States wishes to meaningfully compete in a changing global energy market, Congress needs to reconsider its approach to the taxation of renewable energy companies.[97]

Regardless of whether he United States' participates in resolutions like the Paris Accord or other climate change agreements, the world agrees—the energy market is moving away from fossil fuels.[98] The United States has two options moving forward: (1) continue investing in fossil fuels and risk falling behind the global energy industry; or (2) begin investing in renewables and lead the market in developing and creating cleaner sources of energy. This comment adovcates for the latter proposition.

B. The MLPPA and Phase-out of Fossil Fuels

Some academics have proposed that the MLP be eliminated entirely.[99] However, there is significant concern that eliminating the MLP would create a volatile and unstable energy market.[100] Several large energy companies, such as Midstream, are currently organized as MLPs, and most major MLPs rely on their current structure to operate and generate investment capital.[101] Outright elimination of the structure could create significant problems for these companies and the many investors who rely on MLPs for consistent returns on their investments.[102] An abrupt change could have a domino effect on other industries which rely on MLPs for consistent investment returns. Further, the structure has proven itself useful to promote investment in the fossil fuel industry; those same benefits could prove useful for promoting growth in the renewable energy industry. Expanding the MLP definition of "qualifying income" to include renewable energy projects would be a useful tool to help developers sell and finance renewa-

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95. *Id.*

96. JuliaRosen, *Here's How 6 Countries are Stepping up to Meet the Paris Climate Goals*, Los Angeles Times (Sept. 23, 2019), https://perma.cc/5LHB-BS4X.

97. Mijin Cha, *Government Should Invest in Renewables and Clean Energy*, Mic (Dec. 12, 2011), https://perma.cc/HUC7-9DTG.

98. Somini Sengupta, *The Paris Accord Promised a Climate Solutions. Here's Where We Are Now*, New York Times (Dec. 14, 2018), https://perma.cc/D8G2-4EEB.

99. David Powers, *Fighting The Wrong Fight: Why the MLP Parity Act is a Misguided Attempt at Achieving Renewable Energy Capital Raising Party*, 17 Sustainable Dev. L. & Pol'y 30 (2016).

100. *Id.*

101. Ben Reynolds, Aristofanis Papadatos, Nick McCullum, *2019 List of All Publicly Traded MLPs: Your Master Limited Partnership Investing Guide*, Sure Dividend, https://perma.cc/4D38-DFKX (last visited Mar. 14, 2019).

102. Powers *supra* note 99, at 33. R

ble energy projects more quickly. The structure, because of its consistent returns on investment, would provide an incentive for public investment in renewable energy infrastructure.

As previously noted, the notion that renewables should be able to organize as MLPs is not new. In fact, the MLPPA has been introduced by Delaware Senator Chris Coons four times, including in 2012,[103] 2013,[104] 2015,[105] and 2017.[106] The MLPPA would function as an amendment to IRC § 7704, by including several renewable energy sources and storage in the definition of "qualifying income."[107] The legislation, as proposed, is broad and would encompass most kinds of renewable energy generation, development, and storage projects.[108] Nothing in the MLPPA prevents fossil fuel companies from continuing to organize and maintain the MLP structure.[109] Unfortunately, the bill has never survived committee,[110] but it is likely to be introduced again, hopefully with more support. Although the MLPPA is a step in the right direction, it does not address the current national reliance on fossil fuels as a source of energy. While this economic reality is beyond the scope of this comment, it remains clear that he MLPPA is alone insufficient to completely shift the energy market away from fossil fuels and towards renewable energy.

Congress should seriously consider adopting a version of the MLPPA that would incentivize renewables and stop subsidizing fossil fuels. To improve the chances of renewable energy in the market, Congress should first amend IRC § 7704(c) to include renewable energy sources and storage in the definition of "qualifying income." Essentially, this would mean passing the MLPPA. Renewable energy YieldCos and other companies could then take advantage of the MLP structure and avoid entity-level taxation, likely resulting in more investment from the public because MLPs yield greater returns for their common unit holders. Through simple reorganization, most YieldCos and emerging renewable energy companies would likely transition into the MLP structure. This would give renewable MLPs more access to capital, allowing them to purchase and operate additional projects. Access to more capital would allow developers to turn their projects around faster, spurring growth in the industry.

Adopting the MLPPA merely gives renewables equal footing with fossil fuels, which is not enough to meaningfully promote a renewable energy-

103. Master Limited Partnerships Parity Act, S. 3275, 112th Cong. (2012).
104. Master Limited Partnerships Parity Act, S. 795, 113th Cong. (2013).
105. Master Limited Partnerships Parity Act, S. 1656, 114th Cong. (2015).
106. Master Limited Partnerships Parity Act, S. 2005, 115th Cong. (2017).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

based sector. Rather, Congress should reverse the situation by phasing out fossil fuel companies' use of the MLP structure and disallowing the creation of any new MLPs that are not renewable energy companies. To avoid an unstable energy market, this phase-out should take place over a long enough period to allow for current MLPs to divest their fossil fuel projects and invest in renewable energy projects. Of course, not all existing MLPs will find it economically feasible to convert the requisite amount of income to renewables, which require the company to pay entity-level taxes.[111] Since there are less than 200 existing MLPs,[112] all with very different portfolios, it would be challenging to define a blanket phase-out period. Therefore, Congress should require current MLPs who wish to continue under the structure to develop and submit a transition plan to the Department of Energy. These plans would outline how each company will divest its interests in fossil fuel projects and invest in the production of renewable energy storage or production in order to remain organized as an MLP. A customized approach to this transition gives current MLPs the best chance for a successful investment in the global renewable energy sector.

Transitioning fossil fuels out of the MLP structure is not a catch-all solution and is unlikely to result in a total, or even a significant, market shift away from fossil fuels. To adequately combat climate change, Congress must take more significant steps in regulating greenhouse gas emissions. Further, some existing MLPs may decide it is more economically efficient to pay entity-level taxes rather than divest their fossil fuel projects. This would increase tax revenue generated from fossil fuel companies, which Congress could use to offset the future costs of climate change. While this result may not directly benefit the renewable energy sector, it does incentivize and promote public investment in renewable energy development.

VI. CONCLUSION

Renewable energy is the future. The United States should keep this in mind when it scrutinizes existent energy market subisidies, such as the MLP structure available to fossil fuel companies. Congress should pass legislation that would allow renewable energy companies and projects to take advantage of the MLP structure. Further, such legislation should require existing MLPs to divest their fossil fuel interests and invest in renewable energy projects, or lose their ability to reap the rewards of the MLP structure. It is unlikely that this legislation will be a catch-all solution to the

111. Currently, § 7704(a) imposes corporate tax rates on all publicly-traded corporations. MLPs who chose not to convert will simply be subjected to § 7704 taxation. I.R.C. § 7704(a).

112. Reynolds, Papadatos, McCullum, *supra* note 101.

United States' dependence on fossil fuels, nor will it eliminate the threat of climate change. Nonetheless, it is a step in the renewable direction, and a step toward the future.