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Fighting the Wrong Fight: Why the MLP Parity Act Is a Misguided Attempt at Achieving Renewable Energy Capital Raising Parity

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I. Introduction

During the past three decades, renewable energy has shifted from being an afterthought to a preferred source of power in the United States.[1] This shift comes at a cost. Building renewable energy projects, transitioning from more traditional energy sources, and keeping America's energy infrastructure up to date requires massive amounts of capital investment in order to be feasible.[2] Raising the necessary capital is one of the biggest obstacles facing renewable energy growth.[3] The ability to access the public equity markets to overcome this obstacle and fund these projects will be paramount to the continued growth of the renewable energy sector.[4]

Oil and gas energy producers have used the master limited partnership ("MLP") as a means to efficiently raise capital in the public equity markets.[5] MLPs are traded on public stock exchanges. Rather than shares, an investor purchases units that are limited partnership interests.[6] The sponsor is the general partner, who typically retains two percent ownership in the MLP.[7] Because the MLP is structured as a flow through entity,[8] this affords two main benefits: (1) that the MLP does not pay any tax at the entity level;[9] and (2) that the entity has the ability to make special allocations of income and expenses, which allows the general partner to create innovative incentive structures.[10]

In order to qualify as an MLP, 90 percent or more of the gross income of the partnership must be "qualifying income."[11] Per section 7704(d)(1)(E) of the Internal Revenue Code, qualifying income consists of "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) . . . ."[12] While the Internal Revenue Code specifically allows ventures involved in the exploration, development, mining and productions of oil and gas to pay zero entity level tax, the production of wind, solar or hydroelectric power is not considered qualifying income and thus cannot utilize the MLP structure.[13]

As a result, producers of renewable energies have had to raise public equity through other means and have tried to provide energy investors the tax-free yield they desire in different ways.[14] One such way in which renewable energy investors provide energy investors with tax free yield is through the use of an investment vehicle known as the yieldco.[15] Yieldcos are created by a parent company, again known as the sponsor, who is engaged in the building of renewable energy assets.[16] The sponsor, having built wind or solar assets is eligible to claim a number of tax credits and accelerated depreciation deductions. Once the assets are built, and in some cases, long-term contracts secured to purchase the electricity, the sponsor will sell or contribute the assets to a yieldco. As a result, the hallmark characteristics of a yieldco are an asset or assets producing long-term steady cash flow, and large amounts of tax credits or tax deductions which would have been generated through the building of the facility.[17] The resulting yieldco is a corporation which, despite having positive cash flow and making distributions to its investors, will not have taxable income for a number of years because the deductions and credits will create a "tax shield" that is carried forward until used completely.[18] The lack of taxable income allows the corporation to make distributions tax-free (i.e. the person receiving the distribution does not pay tax on the dividends).[19] This is because when a corporation with no taxable income makes distributions, instead of being considered a dividend, the distributions are instead considered a tax-free return of capital.[20]

Despite its name, the yieldco is legally no different from any other corporation trading on a public equity market.[21] The corporation simply happens to possess yield producing renewable energy assets and the associated tax credits and deductions.[22] However, it is important to note that the entity will become taxable at prevailing rates, and investors will pay tax on any dividends received when these tax credits and deductions are used in their entirety.[23] At that point, the corporation would pay taxes in the same manner as any other corporation, unless new assets are purchased which carry further deductions and credits.[24]

As an alternative, the yieldco could liquidate or restructure, in effect having a limited life. In this case, the market must take this future potential tax or limited life into account when calculating the enterprise value of a yieldco.[25] Therefore, from a purely tax standpoint, the yieldco is less efficient than an MLP, and the sophisticated investor would generally prefer an MLP when faced with the same circumstances.[26] This has the effect, at least in theory, of making the cost of capital higher for the yieldco.[27]

Congress, in recognizing the unavailability of the MLP structure to the renewable energy sector as a disadvantage, is making an attempt to rectify the situation by introducing

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a bill entitled The Master Limited Partnerships Parity Act ("MLPPA").[28] In short, the bill would expand qualifying income to include renewable sources of energy, which opens up the MLP structure to renewable energy producers and allow them to raise capital through the same structure that oil and gas producers have utilized for years.[29] While most of the press regarding the bill has been positive, and there has been no outspoken opposition, there remain significant challenges to its passage. There is the possibility that the bill will be held hostage by further tax reform.[30] Specifically, some may support the bill only if the other tax credits available to renewable energy are repealed, in effect viewing MLP treatment for renewable energy providers as a subsidy on top of a subsidy.[31]

Many would agree that promoting renewable energy is a worthwhile endeavor because it would promote a cleaner environment and reduce dependence on imported oil.[32] Allowing renewable energy access to the same public equity capital as the oil and gas industries would be an important step in promoting renewable energy growth. However, eliminating the ability of the oil and gas industry to utilize the MLP rather than opening it up to the renewable energy sector best achieves this objective.

By exploring the broad history and current landscape of the relevant tax code, this paper aims to show that the current use of the MLP within the energy sector is inconsistent with and contravenes the original intent of Congress. As a result, those wishing to promote renewable energy as a preferred source of energy and achieve capital raising equality with fossil fuel sources are fighting the wrong fight in seeking parity within the MLP landscape. Instead of broadening the scope of the MLP to include renewable energy, the structure should be limited in such a way as to preclude oil and gas companies from operating as MLPs.[33]

Part II A of this paper explores the history, mechanics and legislative background of the MLP. Part II B of this paper explains the Investment Tax Credit ("ITC") and the Production Tax Credit ("PTC"), both of which are integral to understanding the current tax landscape of renewable energy. This part also explores the yieldco, the primary investment vehicle that renewable energy uses as an alternative to the MLP. Part III explains why the MLP Parity Act is a misguided attempt at achieving capital raising parity, and asserts that the better option is to discontinue the oil and gas industry's ability to utilize the MLP. Part IV explains the likely objections to such a proposal and Part V concludes.

II A. The History and Mechanics of the Master Limited Partnership

In the 1970's, the highest individual tax bracket was seventy percent, and tax shelters utilizing the partnership form were a popular way to shelter income. Just as partners were taxed on their share of taxable income, partners were also able to utilize their share of partnership losses. Today, various regulations limit the amount of losses that an investor can utilize,[34] but at that time any and all losses from the partnership could be used to shield personal income tax. For these reasons, the Apache Petroleum Company formed thirty-three oil and gas partnerships between 1959 and 1978. The main appeal of these partnerships were their tax sheltering properties.[35] The partnerships were engaged in the exploration of oil, and their main allure was the fact that sixty-five percent of the investment could be written off in the first year and ninety percent within three years.[36] If the entity found oil, the investor also had the possibility of making a large return on the money invested.[37] Despite these benefits, investors in the partnership had no readily available means to sell the partnership interest.[38] As a result, some investors, who had initially invested for the tax benefits, now faced the dilemma of owning an illiquid partnership interest that started producing taxable income after its tax benefits were exhausted. This confluence of events led to the formation of the first MLP:

> [i]n February 1981, Ray Plank, president and chief executive officer of the Apache Petroleum Co., had a decision to make. The limited partnership tax shelter[s] formed eight-to-ten years earlier [were] now generating taxable income, and many discussions and debates ensued as to what should be done with these shelters. . . What followed was a roll-up of the shelters into a single MLP.[39] A roll-up provides existing limited partners in private or nontraded partnerships with the opportunity to exchange their interests for interest in an MLP. Thus, the roll-up of the Apache shelters into a single MLP provided two results. First, it allowed for the collection of thirty-three separate limited partnerships into one, and second, it provided the investors with a liquid security for their interest [which] could be publicly traded. The success of the MLP was charted in the marketplace.[40]

At the same time this occurred, the highest tax bracket for individuals decreased from seventy percent to fifty percent. With the corporate rate at forty-six percent, the individual rate became, for the first time, comparable to the corporate rate. When taking into account other factors, such as the double taxation problem of corporations, for the first time in history being taxed as an individual was preferable to being taxed as a corporation.[41]

As early as 1983, Forbes magazine predicted the disincorporation of America in order to avoid the corporate tax.[42] The MLP quickly caught on, and by 1987 there were over 100 MLP IPOs.[43] While industries that were familiar to the partnership form, such as oil, gas and real estate, were most common (i.e. those which were common tax shelters in the 1970's), any type of business could use the structure, and at one time the Boston Celtics, La Quinta Motor Inn, casinos and financial advisors were all structured as MLPs.[44]

The Treasury Department, concerned that the decline of corporate tax was becoming a trend, began to petition Congress as early as 1984.[45] They claimed that a publicly traded partnership was merely a corporation in disguise and therefore should pay corporate tax.[46] They also claimed that the complexities of partnership taxation were too much of an administrative burden for the average taxpayer.[47] In 1984 they unsuccessfully proposed to tax any partnership with more than thirty-five partners as a corporation.[48] It was not until the summer of 1987 that successful action was taken. At that time, The Omnibus Budget

Reconciliation Act of 1987 ("OBRA") was enacted.[49] It added three new sections to the Internal Revenue Code, with section 7704 being the most relevant.

Section 7704 applies to taxable years beginning after December 31, 1987.[50] Subsection (a) states the general rule that "a publicly traded partnership shall be treated as a corporation."[51] Subsection (b) defines "publicly traded partnership" and subsection (c) is entitled "[e]xception for partnerships with passive type income."[52] It explains that when 90 percent of a partnership's gross income is considered qualifying income, the exception will be met. Section 7704(d)(1) lists the types of qualifying income. They include interest, dividends, real property rents, gains from disposition of real property and most relevant for present purposes:

> 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. . . [53]

As a result, if ninety percent of the entity's gross income can be considered qualifying income, an MLP can get the best of both worlds: the liquidity associated with being publicly traded on an exchange and no corporate level income tax.

Utilizing this structure, companies engaged in the production, transportation, and storage of fossil fuels and its related infrastructure (known as the sponsor and serving as the MLP's general partner) have been able to successfully raise large amounts of capital from public sources.[54] Like investors in utility companies and energy stocks, typically the MLP has attracted investors seeking long-term stable yield, and in fact, most MLPs distribute large amounts of their available cash to their investors. In most cases, the partnership agreement will require the MLP to distribute all "available cash."[55]

One of the main reasons that most MLPs have high yields is due to the nature of the incentive structure.[56] In most MLP structures, the general partner is incentivized to increase cash distributions to investors as much as possible because they own incentive distribution rights ("IDR").[57] The IDRs are similar to a carried interest, which will be familiar to those who follow the hedge fund and private equity industries; instead of being based upon net income, however, IDRs are based upon cash distributed.[58]

In essence, IDRs are partnership interests that are subordinate to the limited partners' (public) investment. This means that they share a large portion of the downside risk, but they have the benefit of also sharing in a much larger portion of the upside.[59] Mechanically, when cash distributions are made, the public is first paid its distributions up to an amount stated in the offering document.[60] The sponsor shares pro-rata (the general partner will typically own two percent of the MLP and thus take two percent of the cash).[61] Distributions exceeding the stated amount is then subject to a sliding scale, increasing from two percent to fifteen percent, twenty five percent and as high as fifty percent. This means, that despite injecting two percent of the capital, the general partner can take up to fifty percent of the cash distributed.[62] This provides a powerful incentive for the sponsor to maximize distributions.[63]

It may seem that investors' and sponsors' interests are aligned in seeking to maximize distributions.[64] However, this incentive can perversely affect management's decision-making process.[65] Examples include diluting investors by offering new MLP units to raise capital to increase distributions, obtaining new debt to finance distributions, and delaying or ignoring capital improvements to instead use cash for distribution purposes.[66] In each of these situations, investors' and sponsors' interests diverge.[67] Since there is no clawback[68] function associated with the incentive distribution rights, this incentive structure favors short term gains at the potential risk of long term financial health.[69]

While a sponsor would argue that the IDR structure compensates it for the risk it takes in owning subordinate units and for managing the MLP, the mechanics are quite different. Similar to carried interest, the compensation is not a deduction to the MLP and income to the sponsor, but instead a reallocation of income away from the public's units to the sponsor.[70] It should also be noted that a reallocation as described above is something that is available only in the partnership form[71] and therefore is a benefit unique to the partnership.[72] This has the effect of making the economics of an investment in an MLP potentially very different from that of a traditional publicly traded corporation.

At this point, it may not be self-evident as to why any exception exists for a publicly traded entity to be exempt from tax. Two main questions arise. First, why create any exception at all for publicly traded partnerships and instead simply make all publicly traded partnerships taxable? Second, if we accept that some should be exempt from tax, why are the oil and gas industries exempt?

As stated above, Section 7704(c) is entitled "[e]xception for partnerships with passive-type income," so when considering the taxability of a publicly traded partnership, we can more narrowly ask, why create an exception for passive-type income? Here, the legislative history is instructive.

> In general, the purpose of distinguishing between passive-type income and other income is to distinguish those partnerships that are engaged in activities commonly considered as essentially no more than investments, and those activities more typically conducted in corporate form that are in the nature of active business activities. In the former case, the rationale for imposing an additional corporate-level tax on investments in publicly traded partnership form is less compelling, because purchasers of such partnership interests could in most cases independently acquire such investments (or the income has already been subject to corporate-level tax, in the case of dividends). Where the activity of the partnership does not fall into the category of generating passive-type income, however, it is less likely that direct interests in the activity would be available to investors; rather, it is more likely that such activities

would be conducted in corporate form and would therefore be subject to corporate level tax before profits reached the hands of investors.[73]

In terms of interest, dividends, real property rents and gains from the disposition of real property, to the extent that the income truly is passive, "imposing an extra layer of corporate tax makes little sense."[74] Legislative history also instructs as to when passive activity may become active.

> In determining whether income is treated as passive-type income under the provision, in the case of interest and real property rents, it is not intended that amounts contingent on profits be treated as interest or rent. Similarly, amounts based on gross income earned in connection with a non-real estate related activity such as a fast food operation are not treated as passive-type income. Interest or rent (or other amounts) contingent on profits involves a greater degree of risk, and also a greater potential for economic gain, than fixed (or even a market-indexed) rate of interest or rent, and thus is more properly regarded as from an underlying active business activity.[75]

While the above makes clear when rents or interest may cease to be passive, there is no analogous provision concerning natural resources. While investments in natural resources may be similar to collecting rent or interest, as in the case where an MLP "merely passes along royalties from a productive well or steady income from a pipeline,"[76] the legislative history offers no help in determining when or how the line might be crossed. Instead, a reading of the legislative history might leave one wondering whether any such line exists:

> In the case of natural resources activities, *special considerations* apply. Thus, passive-type income from such activities is considerably broader, and includes income and gains from exploration, development, mining or production, refining, transportation (including through pipelines transporting gas, oil, or products thereof), or marketing of, any mineral or natural resource, including geothermal energy and timber. (emphasis added)

Many attribute these "special considerations" to powerful Texas Senator Lloyd Bentsen, who had strong ties to the oil and gas industry.[77] In his *New York Times* article Victor Fleisher states bluntly "that is code for 'effective lobbying." He goes on to explain that today's MLPs are not simply passive type investments, instead many are

> growth companies with volatile earnings. They hold out the promise of capital appreciation, not just steady income, to attract investors. As more MLP's come to resemble normal operating companies, the tax loophole looks more like a straightforward tax subsidy for fossil fuel production. From an environmental standpoint, this is exactly backward. We should be taxing carbon production, not subsidizing it.[78]

It is clear that today's MLPs are not analogous to an investment that a group of people may purchase individually, nor are they passive investment vehicles. Instead they are very sophisticated operating companies. To include them under the heading of passive investments is to distort the original intent Congress had when Section 7704 was added to the Internal Revenue Code.

II B. The Investment Tax Credit, the Production Tax Credit and the Yieldco

The yieldCo has evolved as an effective means for producers of renewable energy to raise public capital in a world where the MLP structure is unavailable due to the current definition of qualifying income.[79] Essentially looking to create a synthetic MLP, the producers of the wind or solar energy producing assets (again, the sponsor) contribute these assets along with the tax credits they generated into a newly formed corporation.[80] The tax credits are a key part of the equation in that they allow the yieldCo to shield tax and thus make tax-free distributions.[81] In most circumstances, the sponsor has already completed building these assets and, in many cases, has already entered into long term contracts for the electricity these assets will produce.[82] The result is a corporation owning completed projects with the ability to produce long-term stable yield that will be tax-free for a period of time.[83] The sponsor will usually retain a voting majority in the corporation thus retaining control[84] and, in many cases, the yieldCo will have a right of first offer for the sponsor's future projects.[85]

In order to compare the MLP and the YieldCo, it must first be understood that the YieldCo structure is not nearly as attractive without the tax credits that its assets generate.[86] These tax credits, known as the Federal Investment Tax Credit ("ITC")[87] and the Federal Production Tax Credit ("PTC")[88] are designed to promote investment in renewable energy projects and production of renewable energy[89] and offer a dollar for dollar reduction in the income taxes they would otherwise have to pay the federal government.[90] The ITC currently offers a tax credit of thirty percent of the amount invested in renewable energy projects,[91] however, this is scheduled to be reduced to ten percent at the end of 2023 with a phase out beginning in 2020.[92] The PTC is offered per kilowatt-hour of electricity generated from renewable energy sources.[93] The PTC will begin phasing out in 2017 and will be completely phased out within five years. A taxpayer gets the benefit of one credit or the other, but cannot take both.[94]

The tax benefits[95] generated will far outweigh the amount of taxable income generated in the first year of operation[96] and are carried forward until used completely by offsetting future taxable income. Typically, this period will last five to ten years.[97] During this time, distributions made by the corporation will be considered return of capital rather than dividend income and will be tax-free.[98]

With this background, we can see that almost all energy produced in the United States is subsidized in one way or another.[99] Renewable energy producers, while not eligible to be treated as an MLP, nevertheless take advantage of significant tax credits.[100] As compared with the MLP whose investors enjoy distributions that are typically eighty percent tax-free and can last indefinitely, the YieldCo offers distributions that are 100% tax-free and can last five to ten years.[101]

It is important to understand that if an MLP were to somehow fail the qualifying income test and be taxed as a corporation, that entity, although legally a partnership, would pay corporate tax.[102] Economically, at least from a tax perspective, it would therefore be no different from the yieldco.[103] Of course, this entity would not have the renewable energy tax credits available to it. Assuming all else was equal and the entity still had its other tax deductions available, corporate tax would be payable on net income like any other corporation.[104] Distributions would be split between return of capital and dividend income with personal income tax being paid on the dividend portion.[105]

III. The MLP Parity Act and Why It Is A Misguided Attempt at Parity

The Master Limited Partnership Parity Act ("MLPPA") was initially introduced in September of 2012[106] and again later in April of 2013.[107] After both attempts died in Congress, the MLPPA has again been reintroduced in June of 2015.[108] Senator Christopher Coons explains the MLPPA:

> The MLP Parity Act simply expands the definition of "qualified" sources to include clean energy resources and infrastructure projects. Specifically included are those energy technologies that qualify under Sections 45 and 48 of the tax code, including wind, closed and open loop biomass, geothermal, solar, municipal solid waste, hydropower, marine and hydrokinetic, fuel cells, and combined heat and power.
>
> The legislation also allows for a range of transportation fuels to qualify, including cellulosic, ethanol, biodiesel, and algae-based fuels, as well as energy-efficient upgrades for buildings, electricity storage, carbon capture and storage, renewable chemicals, and waste-heat-to-power technologies.
>
> The MLP Parity Act does not affect any current MLP entity. All projects currently eligible to structure as MLPs would continue to qualify exactly as they would under existing law.[109]

The website goes on to list a number of supporters, including sponsors from the Senate and the House, both Democrat and Republican, as well as numerous businesses, trade associations, environmental advocates and think tanks.[110] Other news articles tout the MLPPA as a "no brainer" for renewable energy.[111] While its sponsors laud the bill for having bipartisan support and other news articles proclaim that it is "ready for passage,"[112] its passage is far from guaranteed. If the MLPPA is buried in other tax reform it will be a long shot for it to make it through Congress.[113]

Senator Coons explains the MLPPA as "[a] bill to level the playing field by giving investors in renewable energy projects access to a decades-old corporate structure with a tax advantage currently available only to investors in fossil fuel-based energy projects."[114] While leveling the playing field is certainly an admirable goal when it comes to renewable energy, Senator Coons and supporters fail to consider the negative aspects of the MLP.[115] There are three main reasons why the MLPPA should not be passed.

First, in 1987, Congress decided to close the MLP loophole by taxing all publicly traded partnerships as corporations except for those engaged in passive type activities.[116] Through effective lobbying, the oil and gas industry was able to maintain that loophole in the tax code by asserting that they should be considered a passive activity and continue to utilize the MLP structure.[117] Allowing certain types of publicly traded partnerships to operate without incurring taxation was based upon the idea that they held such investments that were akin to investments one could purchase in their individual capacity.[118] The current MLPs do not resemble pooled passive investments; rather they are large operating companies.[119] Allowing them to operate as MLPs is clearly in direct contravention of Congress' original intent.[120] Renewable energy providers are no different. Large scale solar projects and wind farms are not passive activities which investors can purchase individually or as a pooled investment. They require skilled management teams and operational expertise[121] and therefore should not be considered passive investments eligible for MLP treatment.

Second, allowing MLPs to operate without incurring entity level tax costs the Treasury millions in tax revenue each year. In February of 2015, President Obama's 2016 budget proposed to eliminate the availability of the MLP to the oil and gas industry by 2021.[122] The proposal projected that taxing MLPs as corporations would rise upwards of $300 million a year in tax revenue starting in 2021.[123] This again appeared in the 2017 budget.[124] While the 2016 budget proposal attracted some media attention, the 2017 proposal along with the entire 2017 budget garnered minimal media coverage and has largely been viewed as irrelevant.[125] Nevertheless, the budget proposals serve to quantify the amount of subsidies the oil and gas industry receive each year by approximating the amount of taxes saved by utilizing the MLP structure.

Lastly, the MLP's incentive structure is designed to benefit the sponsor at the detriment of investors. Instead of being managed by a board of directors, MLPs are frequently managed by a general partner (or a manager when structured as an LLC) and, as a result, investors in MLPs may have less protection than investors in corporations.[126] Furthermore, ownership of the IDRs incentivizes management behavior, which diverges from investors' best interests[127] and substantial evidence exists that many retail investors do not understand exactly what they are buying when they purchase MLP units on the stock exchange.

Rather than expanding the MLP to include renewable energy sources, those that truly wish to level the playing field should be focused on closing this loophole available to oil and gas.[128] In order to put the renewable energy industry on par with fossil fuels, the appropriate step should be eliminating Section 7704(d)(1)(E) from the Internal Revenue Code. This would have the effect of eliminating the tax subsidies available to fossil fuels by taxing them as any other operating company[129] and in the process raising tax revenues.

IV. Objections

There are obvious hurdles in overhauling a major section of the tax code.[130] MLPs have been around for almost thirty years, and there are currently over 130 of them trading on public stock exchanges.[131] If entity level taxes were imposed on MLPs, this would likely be phased in slowly over a number of years.[132] Nevertheless, the imposition of future taxes would affect future earnings projections and current valuations.[133] Likewise, it would undoubtedly have an effect on the ability of oil and gas sponsors to raise public equity for future projects.[134] The resulting market turmoil would be enough for opponents to strongly resist change of the status quo. Opponents would argue that this turmoil and the higher cost of capital for raising public equity would slow the growth of American's energy infrastructure and cause consumer energy prices to rise.[135]

Americans have become accustomed to cheap energy over the last few decades.[136] Despite enjoying some of the cheapest energy prices in the world, Americans continue to seek cheaper energy.[137] Politicians continually promise policies to lower energy prices and consumers purchase some of the least fuel-efficient automobiles in the world.[138] As a result, any policy raising energy prices is likely to be extremely unpopular and will face strong headwinds.[139] Navigating and overcoming these political challenges, although problematic and particularly troublesome, will be a necessary step in reforming the tax code to achieve parity.

In addition, certain elected leaders have a continuous history of ignoring climate change[140] and as a result have been unsympathetic towards tax reform to promote renewable energy at the expense of the oil and gas industry.[141] As stated above, some members of Congress have been unwilling to support MLP Parity while the ITC and PTC are still in existence.[142] Those members would probably argue that because of the availability of the tax credits, the renewable energy sector already has capital raising parity with the oil and gas industry.

It is arguable that the ITC and PTC are more valuable than the MLP structure, and in fact there seems to be a general consensus that trading tax credits for the MLP structure would be a net negative for the renewable energy sector.[143] While the ITC and PTC are scheduled to phase out and end, this has been the case before and in each case they have been renewed and in some cases expanded.[144] As a result, any legislation repealing the availability of the MLP to oil and gas while the ITC and PTC are still in effect is likely to be extremely hard to pass. Unfortunately, this probably means that any chance of repealing the MLP structure may also require repeal of the ITC and PTC.

V. Conclusion

Although repealing section 7704(d)(1)(E) may be challenging, it is the best option for achieving capital raising parity between fossil fuels and renewable energy. Furthermore, it is important that those arguing for parity for renewable energy understand that enacting the MLP Parity Act can and will have consequences beyond simply allowing producers of renewable energy more tax efficient public capital. The MLP Parity Act will expand and continue the use of the MLP, which, in turn, will have the effect of fueling America's continued energy irresponsibility with subsidized energy. It will expand the use of an investment structure that Congress had good reason to shut the door on in 1987 but survived only due to oil and gas lobbyists. It will promote an investment, which although available to the general public, has recently come under fire as a vehicle enabling managers to take short term risks that may be detrimental to the long-term health of the company.

While oil and gas has its own set of tax subsidies unique to their industry, the renewable energy industry has valuable tax subsidies in the form of the ITC and the PTC. Advocates seeking capital raising parity for renewable energy would be well advised to note the opposition to allowing the renewable energy sector access to the MLP markets while the ITC and PTC are still in effect. Enacting the MLP Parity Act and expanding section 7704 to include renewable energy would allow renewable energy the use of the MLP structure to raise public capital alongside oil and gas. However, if enacted it would most likely make it much harder, if not impossible, to renew the ITC and PTC in the future.

While those who support a policy towards increasing America's use of renewable energy would certainly prefer to keep the ITC and PTC while gaining access to the MLP structure, the current state of American politics make this an unlikely proposition. As a result, proponents of the MLP Parity Act may be forced to trade the ITC and PTC for access to the MLP structure or wait until the tax credits expire. If supporters of capital raising parity for renewable energy also seek to retain the ITC and PTC, an attempt to repeal section 7704(d)(1)(E) has a better chance at achieving that goal than the MLP Parity Act and in the process, achieves significantly more.

Endnotes

1 *See* Meg Handley, *The Poll: Americans Overwhelmingly Support Alternative Energy,* U.S. News & World Report (Apr. 1, 2013), http://www.usnews.com/news/articles/2013/04/01/poll-americans-overwhelmingly-support-alternative-energy.

2 *See* Christopher Riti, *Three Sheets to the Wind: The Renewable Energy Production Tax Credit, Congressional Political Posturing and an Unsustainable Energy Policy,* 27 Pace Envtl. L. Rev. 783, 786-87 (2010); *see also* Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives Are Insufficient to Improve the U.S. Energy Infrastructure*, 44 Harv. J. on Legis. 327, 329 (2007).

3 *See* Michael Mendelsohn & David Feldman, *Financing U.S. Renewable Energy Projects Through Public Capital Vehicles: Qualitative and Quantitative Benefits,* Nat'l Renewable Energy Laboratory, http://www.nrel.gov/docs/fy13osti/58315.pdf (last visited Nov. 13, 2016).

4 *See id.* at 1-2.

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[205] *See, e.g.*, *EnergyGuide Labels,* Fed. Trade Commission (last visited December 8, 2016), https://www.ftc.gov/news-events/media-resources/tools-consumers/energyguide-labels.

[206] *See The Trade and Environment Committee, and Doha Preparations*, WTO, (2001) https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief11_e.htm. The WTO Trade and Environment Committee "needs further discussion [on] how to handle–under the Technical Barriers to Trade Agreement–labeling used to describe whether for the way a product is produced (as distinct from the product itself) is environmentally friendly."

[207]

[208] *See e.g.*, GATT Art. XX.

[209] *See generally* GATT Art. I, Art. III.

[210] *See generally* U.S.–Gasoline, *supra* note 151; U.S. – Shrimp, *supra* note 151.

[211] *See generally* Canada–Energy, *supra* note 136. However, it is important to note the greater flexibility that governments have to require environmental characteristics of products purchased by governments themselves if they are engaged with parties to the revised WTO Agreement on Government Procurement (April 2014). *Supra,* note 151.

[212] *Id.*

[213] *Id.*

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[5] Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for a Cleaner, More Democratic Energy Future,* 31 Yale J. On Reg. 303, 310-11 (2014).

[6] *See Master Limited Partnership,* Investopedia, http://www.investopedia.com/terms/m/mlp.asp (last visited Nov. 13, 2016) (discussing that an MLP may also be structured as a limited liability company with units consisting of membership interests in the LLC).

[7] John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 473-74 (2005).

[8] *See Master Limited Partnership*, *supra* note 7 (noting that regardless of whether the entity is a partnership or an LLC, it does not pay any tax itself and instead reports its earnings to its owners who pay their respective tax shares).

[9] *See* Mormann, *supra* note 6, at 310-11 (noting that conversely, in a typical corporate form, the corporation is subject to corporate tax and the investor is again taxed on dividends it received). This is commonly referred to as double taxation. As a result, using a flow through entity rather than a corporation circumvents the problem of double taxation. *Id.*

[10] *See id.* at 341 (stating that items of income and expense in a corporation must be split pro-rata based upon each owner's shareholding percentage). This is not the case in a flow through entity. *Id.* Instead, separate items of income and expense can be allocated differently in accordance with the partnership agreement. *Id.* As an example, a corporation with $100 of income and two 50/50 shareholders must attribute that income 50/50. *Id.* However, a partnership is free to allocate $75 to one partner or in any other allocation it sees fit. *Id.* This flexibility allows the ability of management to create incentive structures such as the carried interest. *Id.*

[11] *Id.* at 342.

[12] I.R.C. § 7704(d)(1)(E) (2016).

[13] *See* Mormann, *supra* note 6, at 340.

[14] *See* Michael R. Braverman & Stephen C. Braverman, *Chasing Yield: How the Worldwide Glut in Capital is Financing Energy Investment,* 29 Nat. Resources & Env't 3, 6 (2014).

[15] *See* Richard L.Ottinger & John Bowie, *Innovative Financing for Renewable Energy,* 32 Pace Envtl. L. Rev. 701, 742-43 (2015).

[16] *See* Braverman & Braverman, *supra* note 15, at 3, 6.

[17] *Id.* at 6.

[18] *Id.*

[19] *See id.*

[20] *See Topic 404-Dividends,* IRS (Sept. 20, 2016) https://www.irs.gov/taxtopics/tc404.html (explaining that the return of capital reduces the basis of the stock and increases the amount of the taxable gain when the stock is sold).

[21] *See, e.g.*, Interview with David K. Burton, Partner, Akin Gump Struass Hauer & Feld LLP (May 11, 2015).

[22] *See* Marley Urdanick, *A Deeper Look Into Yieldco Structuring,* Nat'l Renewable Energy Laboratory (Sept. 3, 2014), https://financere.nrel.gov/finance/content/deeper-look-yieldco-structuring.

[23] Sean T. Wheeler, *Comparison of Typical MLP and Yieldco Structures,* Latham & Watkins, LLP, http://www.lw.com/thoughtLeadership/lw-mlp-yieldco-comparison (last visited Nov. 13, 2016).

[24] *See id.*

[25] *See Yieldco Induced Highs,* Chadbourne, http://www.chadbourne.com/Yield-Co-Induced-Highs-07-09- 2015_projectfinance (last visited Nov. 13, 2016).

[26] *See* Kimble McCraw, *Energy Finance 101: An Intro to Yield Cos,* Third Way (July 24, 2014), http://www.thirdway.org/report/energy-finance-101-an-intro-to-yield-cos (recognizing that from a strictly economic point of view, there is no doubt that the MLP is the more tax efficient structure). There are some benefits of the yieldco however. *Id.* One such benefit is that because it is not a flow-through entity, the investor receiving cash dividends simply receives a 1099-DIV and pays tax on the portion of the distributions that are treated as dividends (if any). *Id.* In contrast, the investor in an MLP receives a schedule K-1, which is a form reporting his share of the MLP's income. *Id.* He then must pay the tax on that income. *Id.* Because the MLP may have complex operations in multiple states, this can make tax compliance very complex, time consuming and costly. *Id.*

[27] *See id.* (revealing there is some evidence that investors had ignored the long-term consequences of investing in the yieldco and were simply focused on the short-term economics).

[28] Press Release, Senator Christopher Coons (D-DE), Coons, Moran, Poe, Thompson Bill Will Level the Playing Field for Renewable Energy (June 24, 2015), http://www.coons.senate.gov/newsroom/releases/release/mlp-act.

[29] *See id.*

[30] *See* Paul Gaynor, *Great Opportunity for Congress on Energy,* The Hill (June 19, 2014), http://thehill.com/blogs/congress-blog/energy-environment/209801-great-opportunity-for-congress-on-energy.

[31] *See* Robert Rapier, *The MLP Parity Act is a No-Brainer for Renewable Energy,* Energy Trends Insider (May 29, 2014), http://www.energytrendsinsider.com/2014/05/29/the-mlp-parity-act-is-a-no-brainer/; *see also* Robert Rapier, *Renewable Parity Push Renewed,* Investing Daily (July 21, 2015), http://www.investingdaily.com/23245/renewables-parity-push-renewed-2/.

[32] *See* Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?* 46 Tex. Tech. L. Rev. 1067, 1088 (2014).

[33] *See, e.g.*, Nick Juliano, *GOP Dismissive as Obama Revives Efforts to Shift Incentives from Fossil Fuels to Renewables,* Governors' Wind & Solar Energy Coalition (Feb. 3, 2015), http://www.governorswindenergycoalition.org/?p=11661.

[34] Dennis J. Ventry, Jr., *Tax Shelter Opinions Threatened the Tax System in the 1970s,* Tax Analysts (May 15, 2006), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/CC7054D5ADE17F64852571A20068ED13.

[35] *See* Robert Metz, *Market Place; The Apache Partnership,* N.Y. Times, Mar. 5, 1981, http://www.nytimes.com/1981/03/05/business/market-place-the-apache-partnership.html.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id*. (explaining that a new limited partnership was formed for the sole purpose of owning interests in the thirty-three other limited partnerships). An appraiser was hired to determine the value of the holdings of each of the thirty-three limited partnerships and investors in each then had the option to trade their investment in the old limited partnership for an investment in the new limited partnership in a proportion determined by the appraiser. *Id.* The new limited partnership was coined the master limited partnership. *Id.* The response was overwhelming with eighty-six percent of individual investors tendering their limited partnership interests for interests in the new MLP. *Id.*

[40] Marvin F. Milich, *Master Limited Partnerships,* 20 Real Est. L.J. 54, 56-57 (1991).

[41] *See id.* at 58.

[42] *See* Toni Mack, *Disincorporating America*, Forbes, Aug. 1, 1983, at 76.

[43] *See Master Limited Partnerships–101*, Latham & Watkins, LLP, http://www.lw.com/MLP-Portal/101 (last visited Nov. 13, 2016).
[44] *See id.*
[45] *See* Off. of the Sec'y, Dep't of the Treasury, 1 Tax Reform for Fairness, Simplicity and Econ. Growth 146-150 (1984).
[46] *See id.*
[47] *See id.* (explaining that adding to the flow through taxation of partnerships, come state tax implications, basis tracking rules and other considerations which are may be too advanced for the average citizen without an accounting background).
[48] *See id.*
[49] *See* Omnibus Budget Reconciliation Act of 1987, Pub. Law No. 100-203, 101 Stat. 1130 (1987).
[50] *See id.*
[51] I.R.C. § 7704(a) (1987).
[52] I.R.C. § 7704(c) (noting that the term "publicly traded partnership" has been used interchangeably with MLP because an MLP falls within the § 7704(c) exception and shares the publically traded partnership's incentive structure).
[53] I.R.C. § 7704(d)(1)(E).
[54] *See* Matthew J. McCabe, *Master Limited Partnerships' Cost of Capital Conundrum,* 17 U. PA. J. BUS. L. 319, 319 (2014).
[55] *See* Goodgame, *supra* note 8, at 482.
[56] *See* Elliot H. Gue, *The Lowdown on MLP IDRs: Incentive or Impediment?,* Energy and Income Advisor (Sep. 13, 2013), https://www.energyandincomeadvisor.com/the-lowdown-on-mlp-idrs-incentive-or-impediment/.
[57] *See* Tim Fenn, *Master Limited Partnerships: A General Primer*, Latham & Watkins, LLP, https://www.lw.com/admin/Upload/Documents/Latham-Master-Limited-Partnership-Primer-2014.pdf (last visited Nov. 13, 2016).
[58] *See id.*
[59] *See id.*
[60] *See id.*
[61] *See id.*
[62] *See id.*
[63] *See* McCabe, *supra* note 55.
[64] *See* Michael Aneiro, *MLP Governance Structure Puts Investors at Risk – Moody's*, Barron's (July 22, 2014, 11:04 AM), http://blogs.barrons.com/incomeinvesting/2014/07/22/mlp-governance-structure-puts-investors-at-risk-moodys/. (explaining that on its face it seems that incentivizing management to maximize distributions would be beneficial to investors because all share in the distributions pro-rata, however this is not the case).
[65] *See id.*
[66] *See Wells Fargo Securities*, MLP Primer Fifth Edition: A Guide to Everything MLP (Oct. 31, 2013), https://mlpprotocol.files.wordpress.com/2013/03/wells-fargo-mlp-primer-5th-edition.pdf.
[67] *See* Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPS and LLCS,* 37 J. Corp. L. 555, 591 (2012).
[68] *See* Clawbacks, Investopedia, http://www.investopedia.com/terms/c/clawback.asp (last visited Dec. 18, 2016).
[69] *See, e.g.*, William Pentland, *Are MLPs Like Ponzi Schemes?* Forbes (Jul. 12, 2013), http://www.forbes.com/sites/williampentland/2013/07/12/are-mlps-like-ponzi-schemes/; *see also* James Kostohryz, *Ponzi or MLP? Linn Energy's Unsustainable Distributions,* Seeking Alpha (Jul. 12, 2013), http://seekingalpha.com/article/1545382-ponzi-or-mlp-linn-energys-unsustainable-distributions (imagining a scenario where management raises capital to such an extent that new capital raised is being used to pay distributions for previous investors).
[70] *See Master Limited Partnerships–101*, *supra* note 44.
[71] *See* Jason A. Sacks, *Effective Taxation of Carried Interest: A Comprehensive Pass-Through Approach,* 89 Wash. U. L. Rev. 449 (2011) (explaining a corporation's income can only be attributed to investors pro-rata based upon number of shares, and therefore incentive reallocation is not possible in a corporate setting).
[72] *See id.*
[73] H.R. Rep. No. 100-391, at 2313-683 (1987).
[74] Victor Fleischer, *How the IRS Encourages Oil and Gas Spinoffs*, N.Y. Times (Jun 18, 2013), http://dealbook.nytimes.com/2013/06/18/how-the-i-r-s-encourages-oil-and-gas-spinoffs/?_r=0.
[76] Fleischer, *supra* note 75.
[77] *See* Pete Brush, *Big Wind Aims to Crash PE, Oil Cos. Partnership Party*, Law 360 (Nov. 30, 2011), http://www.law360.com/articles/286330/big-wind-aims-to-crash-pe-oil-cos-partnership-party.
[78] Fleischer, *supra* note 75.
[79] *See* Mormann, *supra* note 6, at 342.
[80] *See* Braverman & Braverman, *supra* note 15, at 6.
[81] *See The YieldCo Structure: Unlocking the Value in Power Generation Asset*s, http://www.ey.com/Publication/vwLUAssets/ey-yieldco-brochure/$FILE/ey-yieldco-brochure.pdf (last visited Nov. 13, 2016).
[82] *See* Braverman & Braverman, *supra* note 15, at 6.
[83] *See* Wheeler, *supra* note 24.
[84] *See id.*
[85] *See* Andrea L. Nicholas and Michael J. Hong, *'Yieldcos' Present a New Growth Model for Renewable Energy Companies*, Skadden, Arps, Slate, Meagher & Flom LLP, https://www.skadden.com/insights/yieldcos-present-new-growth-model-renewable-energy-companies (last visited Nov. 13, 2016).
[86] *See* Robert Rapier, *First Solar Takes a Shine to Yieldco*, Investing Daily, http://www.investingdaily.com/22304/first-solar-takes-a-shine-to-yieldco-2/ (last visited Nov. 13, 2016).
[87] *See* I.R.C. § 48.
[88] *See* I.R.C. § 45.
[89] *See* Mormann, *supra* note 6, at 313.
[90] *See* Kevin M. Walsh, *Renewable Energy: Where We Are Now and How Renewable Energy Investment and Development Can Be Expanded* 23 U. Miami Bus. L. Rev. 69, 73 n.10 (2014).
[91] *See* Mormann, *supra* note 6, at 314-15.
[92] *See* Jeffrey G. Davis, *Good and Bad News for Renewable Energy Tax Credit*s, Law 360, http://www.law360.com/articles/746784/good-and-bad-news-for-renewable-energy-tax-credits (last visited Nov. 13, 2016).
[93] *See* I.R.C. § 45(a)(2).
[94] *See* I.R.C. § 48(a)(5).
[95] *See id.* (specifying that tax benefits include both the ITC or PTC as well as depreciation deductions).
[96] *See* Braverman & Braverman, *supra* note 15, at 6.
[97] *See* Wheeler, *supra* note 24.
[98] *See id.* (noting however that distributions considered return of capital will instead reduce the basis of an investors shares. This may have the effect of increasing taxable gain in the future when the stock is sold. Therefore, this might properly be better reflected as tax deferral rather than tax free, although capital gains rate would usually apply).
[99] *See, e.g.*, Blake Harrison, *Expanding the Renewable Energy Industry Through Tax Subsidies Using the Structure and Rationale of Traditional Energy Tax Subsidies*, 48 U. Mich. J.L. Reform 845 (2015); *see also* Vinod Khosla, *Open Letter to 60 Minutes and CBS,* Khosla Ventures (Jan. 14, 2014), http://www.khoslaventures.com/open-letter-to-60-minutes-and-cbs (explaining the various ways the fossil fuel energy is subsidized).
[100] *See* Kevin M. Walsh, *Renewable Energy: Where We Are Now and How Renewable Energy Investment and Development Can Be Expanded*, 23 U. Miami Bus. L. Rev. 69, 75 (2014).
[101] *See* Wheeler, *supra* note 24.
[102] *See* Victor Fleischer, *Taxing Blackstone,* 61 Tax L. Rev. 89, 106 (2008).
[103] *See Master Limited Partnerships–101*, *supra* note 44.
[104] *See* I.R.C. § 7704(a).
[105] *See* Wheeler, *supra* note 24.
[106] *See* S. 3275, 112th Cong. (2012).
[107] *See* S. 795, 113th Cong. (2013).
[108] *See* S. 1656, 114th Cong. (2015).
[109] Christopher Coons, *The Master Limited Partnerships Parity Act,* http://www.coons.senate.gov/issues/master- limited-partnerships-parity-act (last visited Nov. 13, 2016).
[110] *See id.*
[111] *See* Robert Rapier, *The MLP Parity Act is a No-Brainer for Renewable Energy*, Energy Trends Insider (May 29, 2014), http://www.energytrendsinsider.com/2014/05/29/the-mlp-parity-act-is-a-no-brainer/.
[112] *See* Maria Gallucci, *A Rare Bipartisan Clean Energy Bill is Ready for Passage*, Inside Climate News (May 13, 2013), http://insideclimatenews.org/news/20130513/rare-bipartisan-clean-energy-bill-ready-passage (noting that the bill was not ready).
[113] *See* Paul Gaynor, *Great Opportunity for Congress on Energy*, The Hill (Jun. 19, 2014), http://thehill.com/blogs/congress-blog/energy-environment/209801-great-opportunity-for-congress-on-energy.
[114] Coons, *supra* note 110.
[115] *See* Jeff Benjamin, *Investors Facing the Dark Side of MLP Investing*, Investment News (Oct.7, 2015), http://www.

investmentnews.com/article/20151007/BLOG12/151009946/investors-facing-the-dark-side-of-mlp-investing.
[116] *See* I.R.C. § 7704.
[117] *See* Pete Brush, *Big Wind Aims to Crash PE, Oil Cos. Partnership Party*, Law 360 (Nov. 30, 2011), http://www.law360.com/articles/286330/big-wind-aims-to-crash-pe-oil-cos-partnership-party.
[118] *See* H.R. Rep. No. 100-391, at 2313-683 (1987).
[119] *See* Fleischer, *supra* note 75.
[120] *See id.*
[121] *See id.*
[122] *See* Keith Goldberg, *Obama Tax Proposal Would Spell Doom for Oil, Gas MLPs*, Law 360 (Feb. 4, 2015 5:03 PM), http://www.law360.com/articles/618092/obama-tax-proposal-would-spell-doom-for-oil-gas-mlps.
[123] *See* Office of Mgmt. & Budget, Fiscal Year 2016: Budget of the U.S. Government, https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf (last accessed Nov. 13, 2016).
[124] *See* Office of Mgmt. & Budget, Fiscal Year 2017: Budget of the U.S. Government, https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/budget.pdf (last accessed Nov. 13, 2016).
[125] *See* Stan Collender, *Final Obama Budget Will Be Worthless*, Forbes (Feb. 1, 2016, 12:01 AM), http://www.forbes.com/sites/stancollender/2016/02/01/final-obama-budget-will-be-worthless/#667e877943ab (stating that the craziness of the 2016 election will severely limit media interest in and coverage of what Obama proposes).
[126] *See* Michael Aneiro, *MLP Governance Structure Puts Investors at Risk – Moody's*, Barron's (July 22, 2014, 11:04 AM), http://blogs.barrons.com/incomeinvesting/2014/07/22/mlp-governance-structure-puts-investors-at-risk-moodys/.
[127] *See* John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 501-02 (2005).
[128] *See* Goldberg, *supra* note 123 (stating that President Obama has attempted this, but at this stage his ability to pass this proposal is a longshot).
[129] *See id*. (suggesting that this would effectively cause all MLPs to be taxed the same as yieldcos and renewable energy would achieve capital raising parity with the oil and gas industry).
[130] *See* Ashley Parker, *Tax Overhaul Plan Faces Key Hurdles,* N.Y. Times (Feb. 25, 2014), http://www.nytimes.com/2014/02/26/us/politics/gop-tax-plan-seeks-cuts-in-rates-and-number-of-brackets.html.
[131] *See Master Limited Partnerships–101*, *supra* note 44.
[132] *See* Christopher L. House & Matthew D. Shapiro, *Phased-In Tax Cuts and Economic Activity,* 96 Am. Econ. Rev. 1835 (2006).
[133] *See* Thomas W. Downs and Hassan Tehranian, *Predicting Stock Price Responses to Tax Policy Changes,* 78 Am. Econ. Rev. 1118, 1126 (1988).
[134] *Benefits of MLPs*, Stocks 500 Morningstar, http://news.morningstar.com/classroom2/course.asp?docId=145579&page=4 (stating that "[t]he absence of taxes at the company level gives MLPs a lower cost of capital than is typically available to corporations, allowing the MLPs to pursue projects that might not be feasible for a taxable entity.").
[135] *See* Peter Stass, *MLP Equity Issuance: Past and Present*, Energy & Income Advisor (Jan. 28, 2016), https://www.energyandincomeadvisor.com/mlp-equity-issuance-past-and-present/.
[136] *See* Ben Liberman, *Correcting Mistakes of the 1990s Should Top the Energy Agenda for 2006*, Backgrounder (Mar. 20, 2016), http://www.heritage.org/research/reports/2006/03/correcting-mistakes-of-the-1990s-should-top-the-energy-agenda-for-2006.
[137] *See* Rachael Salcido, *Rationing Environmental Law in a Time of Climate Change,* 46 Loy. U. Chi. L. J. 617, 660 (2015).
[138] *See* William A. Pizer, *The Economics of Improving Fuel Economy*, Resources for the Future (Nov. 17, 2006), http://www.rff.org/research/publications/economics-improving-fuel-economy.
[139] *See* Editorial Board, *States Should Raise the Gas Tax,* N.Y. Times (Jan. 15, 2016), http://www.nytimes.com/2016/01/16/opinion/states-should-raise-the-gas-tax.html?_r=0.
[140] *See* Paul Waldman, *On Climate Change, Republicans are Truly Exceptional,* Wash. Post (Dec. 1, 2015), https://www.washingtonpost.com/blogs/plum-line/wp/2015/12/01/on-climate-change-republicans-are-truly-exceptional/.
[141] *See, e.g.*, League of Conservation Voters, *In Their Own Words, 2016 Presidential Candidates on Renewable Energy* (Oct. 5, 2016), http://www.lcv.org/assets/docs/presidential-candidates-on-renewable.pdf.
[142] *See* Robert Rapier, *Gridlocked Congress No Threat to MLPs*, Investing Daily (Aug. 5, 2013), http://www.investingdaily.com/18020/gridlocked-congress-no-threat-to-mlps/.
[143] *See* E. Cabell Massey, Comment, *Master Limited Partnerships*, 87 U. Colo. L. Rev. 1011, 1029 (2016).
[144] *See* Cassandra Sweet, *Wind, Solar Companies Get Boost from Tax-Credit Extension,* Wall St. J. (Dec. 16, 2015), http://www.wsj.com/articles/wind-solar-companies-get-boost-from-tax-credit-extension-1450311501.

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[10] *See* SPS Agreement, Annex C(4) (defining "risk assessment" in relevant part as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied.").
[11] *See* SPS Agreement, art. 8.
[12] *See* SPS Agreement, art. 5.7 (detailing the relevant obligations under Article 5.7).
[13] *See* SPS Agreement , art. 8 (detailing the relevant obligations under Article 8).
[14] *See United States – Animals*, *supra* note 2, at ¶¶ 7.672-.673.
[15] Loppacher, *supra* note 4, at 674.
[16] *See infra* Part III (exemplifying some such violations); *see generally* Loppacher, *supra* note 4, at 667-68 (2007) (discussing "regionalism" and its economic impact, as well as frustrations with the implementation of Article 6 that have been voiced at the WTO).
[17] *See infra* Part II.
[18] *See infra* Part III.
[19] *See infra* Part IV.
[20] *See infra* Part V.
[21] *See generally* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (comprising part of the law governed by the WTO).
[22] *See* SPS Agreement, Annex A(1) (defining in relevant part "sanitary or phytosanitary measure" as "any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; . . . (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests").
[23] *See* SPS Agreement art. 2.2; *see also* Warren H. Maruyama, *A New Pillar of the WTO: Sound Science*, 32 Int'l Law, 651, 651 (1988) (dubbing "sound science" a new pillar of the WTO).
[24] *See generally* John H. Jackson et al., Legal Problems of International Economic Relations Cases, Materials and Text 399-403, 697-700 (6th ed. 2013) (noting that technical barriers to trade including SPS measures have become increasingly significant); *see also* Loppacher, *supra* note 4, at 667, 668 (asserting that as tariff barriers fall, illegitimate barriers disguised as SPS measures, and others, are raised).
[25] *See* SPS Agreement Preamble, arts. 2.2, 2.3., 5.6 (explaining the limitations on applying SPS measures are founded in scientific evidence, non-discrimination, and avoidance of disguised restrictions on international trade).
[26] *See WTO Members Raise Record Number of Trade Concerns on Food Safety, Animal and Plant Health*, World Trade Organization (July 15-16, 2015), https://www.wto.org/english/news_e/news15_e/sps_15jul15_e.htm.
[27] *See* James F. Smith, *From Frankenfood to Fruit Flies: Navigating the WTO/SPS*, 6 U.C. Davis J. Int'l & Pol'y 1, 10 (2000) (remarking that instead of creating SPS standards, the SPS Agreement provides rules for the adoption of sanitary and phytosanitary measures); *see also Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, World Trade Organization (May 1998), https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.
[28] *See* Maruyama, *supra* note 23, at 651-53 (commenting that the balance between states' sovereign right to protect their citizens and requiring them to base those protections in demonstrable science is delicate and contentious).
[29] *See* SPS Agreement, art. 6.