# New Developments in Master Limited Partnership Governance

By *John Goodgame**

*In February 2005,* The Business Lawyer *published an article describing the state of master limited partnership ("MLP") governance, which at that time had become relatively standardized. However, since that time, a number of MLPs have been formed or have restructured in ways significantly different from the previously standard MLP governance model. This article describes the changes that have occurred in the MLP marketplace and discusses these "new" MLP governance models.*

## I. Introduction

The term master limited partnership ("MLP") refers to publicly traded limited partnerships (and sometimes limited liability companies) that typically own energy-related assets and provide tax-advantaged cash flow to their investors.[1] While MLPs typically have been governed in a manner significantly different from publicly traded corporations, recent events in the MLP marketplace have given rise to new governance models, some of which are closer to (but still different from) that of traditional publicly traded corporations.

In February 2005, *The Business Lawyer* published an article describing the state of MLP governance,[2] which at that time had become relatively standardized. But since that time, a number of MLPs have been formed or have restructured in ways significantly different from the previously standard MLP governance model. This article seeks to describe the changes that have occurred in the MLP marketplace and to discuss the "new" and evolving MLP governance models. Part II of this article describes MLPs generally and provides an overview of the traditional, or "sponsored," MLP governance model. Part III describes the primary ways in which a number of MLPs have varied their governance arrangements from those of the traditional model. Last, Part IV discusses potential effects of these changes in the standard MLP governance model.

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1. *See generally* John Goodgame, *Master Limited Partnerships*, 60 Bus. Law. 471 (2005).
2. *Id.*

## II. MLPs: An Overview

### A. What Is an MLP?

An MLP is a limited partnership ("LP") or limited liability company ("LLC"), some or all of the limited partner (or limited liability company) interests of which are publicly traded.[3] Those interests are typically called "common units,"[4] and are analogous to the common stock of a corporation. The key attribute of an MLP—indeed, its reason for existing—is its classification as a partnership for federal income tax purposes, which permits "pass through" tax treatment of its income and thus provides "tax-sheltered" income to its common unitholders.[5] This treatment is available to any MLP so long as 90 percent or more of its revenue constitutes "qualifying income"[6]—that is, among other things, income from the "exploration, development, mining or production, processing, refining, or transportation . . . of any mineral or natural resource,"[7] including oil, natural gas, and natural gas liquids, as well as rents, income, and gain associated with real property.[8]

Because the income tax rules provide these tax advantages to entities pursuing energy-related businesses, many MLPs (including all of the largest MLPs) own energy assets—most often pipelines or other "midstream" or "infrastructure" assets, but also propane distribution networks, oil and gas exploration and production assets, and hydrocarbon shipping assets.[9] A few MLPs own real estate or other miscellaneous assets,[10] and some publicly traded private equity affiliates are structured as limited partnerships.[11] However, because those entities are a relatively small part of the publicly traded partnership market and have different investor and market expectations, this article will focus only on energy-related MLPs.

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3. John C. Ale, *Master Limited Partnerships*, *in* Partnership Law for Securities Practitioners § 6:1, at 6-2 (Marc I. Steinberg ed., 2004). As publicly traded partnerships, MLPs are sometimes referred to as "PTPs," but are most commonly referred to as MLPs.

4. Most MLPs refer to their publicly traded limited partner interests as common units, though a few refer to them as "limited partner units."

5. Goodgame, *supra* note 1, at 471–72.

6. I.R.C. § 7704(d) (2006 & Supp. II 2008). If a publicly traded partnership generates less than 90 percent of its revenue from qualifying income sources, that partnership will be taxed as a corporation. I.R.C. § 7704(c)(2) (2006).

7. I.R.C. § 7704(d)(1)(E) (2006 & Supp. II 2008) (stating that "natural resource" includes oil, natural gas, and any products derived from the process of refining oil or natural gas (including propane), but not any products that have been further processed, such as plastics).

8. I.R.C. § 7704(d)(1)(F) (2006). For a more fulsome discussion of the tax nature of MLPs, see Goodgame, *supra* note 1, at 471–72; and David A. Guenther, *Taxes and Organizational Form: A Comparison of Corporations and Master Limited Partnerships*, 67 Acct. Rev. 17, 33–35 (1992).

9. *See PTPs Currently Traded on U.S. Exchanges*, Nat'l Ass'n of Pub. Traded P'ships, http://www.naptp.org/PTP101/CurrentPTPs.htm (last visited Oct. 8, 2012) (www.naptp.org is the website of the National Association of Publicly Traded Partnerships, the industry trade group for MLPs).

10. *Id.*

11. *Id.*

## B. What Does the MLP Market Look Like Today?

Today, there are eighty-seven energy-related MLPs traded on the NYSE (including the NYSE Arca), the AMEX, and the NASDAQ National Market.[12] Most of today's MLPs own their energy assets directly or through subsidiaries; the exceptions are the few "general partner holding company" entities, which are publicly traded LPs (or, in one instance, LLCs) that own the general partner interest (and usually limited partner interests) in an affiliated MLP. For example, Alliance Holdings GP, L.P. is publicly traded[13] and its sole assets are its general partner and limited partner interests (and related incentive distribution rights) in Alliance Resource Partners, L.P.,[14] an MLP that produces and markets coal.[15] This arrangement permits public equity holders to share in the upside associated with the general partner's interest in the underlying MLP—especially once the underlying MLP begins to pay incentive distributions.[16]

Most of today's energy MLPs operate under nearly identical governance arrangements, within the legal framework provided by the Delaware Revised Uniform Limited Partnership Act ("DRULPA"),[17] and within very similar contractual frameworks. This article will refer to this set of arrangements as the "sponsored MLP model."

## C. The Sponsored MLP Model: How MLPs Have Traditionally Been Governed

The traditional MLP governance model, or the sponsored MLP model, consists of (1) a publicly traded limited partnership with one general partner (an LP, corporation, or LLC), which typically owns a small (between 0.1 percent and 2.0 percent) general partner interest in the MLP;[18] (2) a decided lack of direct influence by the limited partners upon the entity's governance;[19] and (3) a suite of contractual arrangements that incentivize the general partner to govern the MLP in a manner that generates steady and increasing cash distributions to the limited partners.[20] The entity that actually holds the general partner interest is typically a special purpose vehicle—a subsidiary with few, if any, assets or liabilities other than the general partner interest and incentive distribution

12. *Id.*

13. NASDAQ: AHGP.

14. Alliance Holdings GP, L.P., Annual Report (Form 10-K), at 1 (Feb. 28, 2012). All filings referenced in this article are EDGAR filings available on the website of the Securities and Exchange Commission ("SEC"), http://www.sec.gov. The dates indicated are the dates the filings were made with the SEC.

15. Alliance Resource Partners, L.P., Annual Report (Form 10-K), at 1 (Feb. 28, 2012).

16. *See* Goodgame, *supra* note 1, at 477–79 (describing the benefit of incentive distributions to the general partner).

17. Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, §§ 17-101 to -1111 (2005 & Supp. 2010).

18. Goodgame, *supra* note 1, at 473.

19. *Id.* at 491–99.

20. *Id.* at 474–79.

rights—owned by a more substantial entity.[21] That more substantial entity, typically called the MLP's "sponsor," is sometimes (but not always) a publicly traded corporation.[22]

Like corporate governance, MLP governance occurs within many different legal frameworks, including state law, federal securities law, and the requirements of the exchange on which the MLP's equity securities are listed. While the federal securities laws generally treat MLPs and other publicly traded entities identically, the contractual nature of MLP governing documents and the disparate treatments of partnerships and corporations under relevant state law have caused the typical MLP to have a significantly different governance structure than the typical publicly traded corporation.

The most salient governance difference is the difference between limited partnerships and corporations: a corporation is governed by its board of directors,[23] which is elected by its shareholders and owes the corporation and its shareholders fiduciary duties;[24] a limited partnership, on the other hand, is governed by its general partner,[25] which owes the limited partnership a set of duties that are often contractually defined and very circumscribed.[26] While all traditional MLP general partners have a board of directors,[27] the members of that board are elected by the sponsor (in its capacity as the owner of the general partner entity), not the MLP common unitholders, and serve (and may be removed) solely at the pleasure of the sponsor.[28]

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21. *Id.* at 473; *see generally* DEL. CODE ANN. tit. 6, § 17-403(b) (2005) (holding general partners jointly and severally liable for all liabilities of their limited partnerships, and thus making the sponsor generally hesitant to own the general partner interest through an entity with substantial assets).

22. *See, e.g.*, Kinder Morgan Energy Partners, L.P., Annual Report (Form 10-K), at 4 (Feb. 21, 2012) [hereinafter Kinder Morgan 10-K] (disclosing that its general partner is owned by Kinder Morgan, Inc., a publicly traded entity); Western Gas Partners, L.P., Annual Report (Form 10-K), at 6 (Feb. 28, 2012) [hereinafter Western Gas 10-K] (disclosing that its general partner is owned by Anadarko Petroleum Corporation, a publicly traded entity); Holly Energy Partners, L.P., Annual Report (Form 10-K), at 5 (Feb. 24, 2012) (disclosing that its general partner is owned by Holly Frontier Corp., a publicly traded entity). *But see* Memorial Production Partners, L.P., Final Prospectus 3–4 (Dec. 9, 2011) [hereinafter Memorial Production Prospectus] (disclosing that its general partner is owned by Memorial Resource Development, LLC, a private entity owned by private equity funds).

23. DEL. CODE ANN. tit. 8, § 141 (2011).

24. The fiduciary duties owed by corporate directors have been characterized by the Delaware Supreme Court as duties of due care and loyalty. Stone *ex rel.* AmSouth Bancorp v. Ritter, 911 A.2d 362, 370 (Del. 2006). The *Stone* court noted that, while directors also owe a duty of good faith, that obligation is effectively subsumed within the broader and more fundamental duty of loyalty. *Id.*

25. DEL. CODE ANN. tit. 6, § 17-403.

26. *See* Goodgame, *supra* note 1, at 494–98 (describing typical contractual replacement of fiduciary duties in MLP partnership agreements).

27. *See, e.g.*, Enterprise Products Partners, L.P., Annual Report (Form 10-K), at 121 (Feb. 29, 2012) [hereinafter Enterprise Products 10-K] (listing the members of its general partner's board of directors); Kinder Morgan 10-K, *supra* note 22, at 82 (listing the members of its general partner's board of directors); Energy Transfer Partners, L.P., Annual Report (Form 10-K), at 85 (Feb. 22, 2012) [hereinafter Energy Transfer 10-K] (listing the members of its general partner's board of directors).

28. *See, e.g.*, Enterprise Products 10-K, *supra* note 27, at 65 (disclosing the method of selection of its general partner's board of directors); Kinder Morgan 10-K, *supra* note 22, at 82 (disclosing the

While the relationship of the board of an MLP general partner to the MLP and its limited partners resembles that of the board of directors of a Delaware corporation to that corporation and its shareholders, in practice the MLP board rarely owes corporate-style fiduciary duties to the MLP and its common unitholders because MLP partnership agreements explicitly modify or eliminate any such duties.

Every MLP that is a limited partnership is governed by DRULPA, which explicitly permits the contractual modification, restriction, and elimination of fiduciary duties.[29] Section 17-1101(d) of DRULPA states:

> To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) . . . to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.[30]

In addition, section 17-1101(f) of the DRULPA states:

> A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.[31]

The Delaware courts have consistently read the provisions of section 17-1101 unambiguously: the partnership agreement of a limited partnership may contractually modify or eliminate fiduciary duties, and actions taken by a person that might have breached a fiduciary duty had the acting person been a corporate director do not breach any such duty, or create any liability, if the behavior in question was permitted by the partnership agreement.[32] The single statutory limitation on this "freedom of contract" position is the "implied contractual covenant of good faith and fair dealing,"[33] which is now effectively "the 'floor' beneath which duties may not be eliminated."[34] Thus, although the directors

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method of selection of its general partner's board of directors); Energy Transfer 10-K, *supra* note 27, at 83 (disclosing the method of selection of its general partner's board of directors).

29. Del. Code Ann. tit. 6, § 17-1101(d) (2005).

30. *Id.*

31. *Id.* § 17-1101(f).

32. *See* Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 Suffolk U. L. Rev. 927, 952–60 (2004) (describing Delaware courts' enforcement of fiduciary duty restrictions and waivers in limited partnership agreements); *see also* Gelfman v. Weeden Investors, L.P., 792 A.2d 977 (Del. Ch. 2001) (discussing the substitution of a lowered contractual standard for the otherwise-applicable entire fairness standard based on the clear terms of the limited partnership agreement).

33. Del. Code Ann. tit. 6, § 17-1101(d).

34. For an overview of the implied covenant under Delaware law, see Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 Bus. Law. 1469, 1485 (2005).

of the corporate general partner of an MLP owe fiduciary duties to that corporation, where the general partner itself owes only limited duties to the MLP and its limited partners, the directors of the general partner, when acting on its behalf in the management of the MLP, themselves likewise owe only limited duties to the MLP and its limited partners.

Because DRULPA grants limited partnerships so much flexibility and permits the wholesale replacement and elimination of traditional fiduciary duties (subject only to the implied contractual covenant of good faith and fair dealing), the MLP partnership agreement itself, which establishes the relationship between the general partner and the limited partners, can generally be considered the true governing law for any MLP.[35]

Though MLPs are fairly recent in vintage, by 2005 the sponsored MLP model had become the standard MLP governance model. This model is most clearly defined by the degree of control exercised by the general partner (and, indirectly, by the sponsor) and the minimal direct influence available to the common unitholders.[36] The public equity holders—the limited partners—have no real ability to change, or even challenge, the general partner's management of the MLP's business.[37] Because common unitholders typically do not elect the directors of the general partner,[38] MLPs generally do not hold annual meetings, so there is no annual meeting proxy statement on which common unitholders may include shareholder proposals or propose an alternative slate of directors.[39] If enough limited partners agree, they may be able to remove the general partner; however, this ability may be more illusory than useful.[40] The only rational action that a dissatisfied unitholder can take with regard to a sponsored MLP is to vote with her wallet and sell her common units.

35. *See, e.g.*, Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1022–24 (Del. Ch. 2010) (stating that as a result of the provisions of the Enterprise GP Holdings limited partnership agreement, the only duties owed by the general partner arise from the contractual standards in that limited partnership agreement and the implied covenant of good faith and fair dealing). *See also* Del. Code Ann. tit. 6, § 17-1101(c) (noting that "[i]t is the policy of [the Delaware LP statute] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.").

36. *See* Goodgame, *supra* note 1, at 491–99.

37. *Id.* at 491–94.

38. *See* sources cited at *supra* note 28.

39. Goodgame, *supra* note 1, at 494.

40. As a practical matter, removal of an MLP's general partner may be virtually impossible, because most MLP partnership agreements contain provisions that may require the general partner to be "bought out" at fair market value by the successor general partner. *See, e.g.*, Western Gas Partners, L.P., First Amended and Restated Agreement of Limited Partnership § 11.3(a), Current Report (Form 8-K), exh. 3.1 (May 24, 2008) [hereinafter Western Gas LP Agreement] (stating that the new general partner must be confirmed by a vote of the limited partner interests, including any limited partner interests owned by affiliates of the departing general partner). This could possibly allow the departing general partner to veto any potential successor and thus derail the removal process. *See id.* § 11.2. Additionally, many MLPs have significant indebtedness (typically bank facilities and bonds issued under indentures), which often have change-of-control provisions providing for acceleration of all indebtedness if the general partner is removed; and many, if not most, MLPs have "poison pill" provisions in their partnership agreements. *See id.* § 1.1 (defining "Outstanding").

Delaware case law makes clear that where an MLP partnership agreement clearly and unambiguously defines the general partner's duties to the MLP, Delaware will look only to that partnership agreement to determine what duties are owed by the general partner, and whether any of those duties have been breached.[41] Accordingly, common unitholders can challenge the general partner's behavior only where the general partner did not comply with the express terms of the partnership agreement[42] or violated the implied covenant of good faith and fair dealing.[43]

Because the sponsored MLP model gives common unitholders so little influence over governance, and because the market discipline associated with potential hostile takeover activity does not threaten sponsored MLPs,[44] the governance arrangements for sponsored MLPs have typically included a number of contractual provisions designed to align the interests of the common unitholders and the general partner (and, accordingly, the sponsor). Those provisions, which are designed to incentivize the general partner to cause the MLP to make steady (and steadily increasing) distribution payments,[45] include (1) the obligation of the MLP to distribute all "Available Cash,"[46] which makes the MLP more dependent on the capital markets for future financing (and accordingly requires the MLP to continue to be viewed by the market as a "good investment");[47] (2) the minimum quarterly distribution protections during the "subordination period" immediately following the IPO;[48] and (3) the incentive distribution rights ("IDRs"), which provide the general partner with increasing portions of the MLP's cash flow as distributions on the common units increase.[49] These contractual provisions, contained in the LP agreement itself, encourage MLPs to generate predictable and rising cash distributions; accordingly, MLP managements generally pursue assets that provide steady cash flows, like pipelines and other midstream energy assets, and oil and gas exploration and production ("E&P") assets where those assets' cash flows could be reliably hedged to generate steady cash flows.

## III. Changes to the Traditional Sponsored MLP Model

### A. Copano and LINN IPOs: The Public LLC Model

The first significant change to the traditional model occurred in November 2004, when Copano Energy, L.L.C. ("Copano") completed its initial public offering.[50]

41. *See, e.g.*, Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1017–18 (Del. Ch. 2010). But where a partnership agreement does not clearly and unambiguously define the general partner's duties, Delaware courts will revert to the default rule, in which the general partner owes a corporate-style fiduciary duty to the limited partnership and its limited partners. Del. Code Ann. tit. 6, § 17-403 (2005).

42. *Lonergan*, 5 A.3d at 1017.

43. *Id.*

44. Goodgame, *supra* note 1, at 498.

45. *See id.* at 474–79 (describing the incentive theory behind the MLP contract structure).

46. *See id.* at 474–76 (describing the typical obligation to distribute all Available Cash).

47. *Id.* at 501–04.

48. *See id.* at 474–77 (describing the typical "Minimum Quarterly Distribution," "Subordinated Units," and "Subordinated Period" arrangements in MLP partnership agreements).

49. *Id.* at 478–79.

50. Copano Energy, L.L.C., Final Prospectus (Nov. 9, 2004).

Unlike previous MLPs, Copano went public as a Delaware LLC, an entity treated as a partnership for federal income tax purposes but without a general partner.[51] While the Delaware Limited Liability Company Act ("DLLCA")[52] permits an LLC to have a managing member (which often serves the same role as a general partner in a limited partnership)[53] and modify or eliminate fiduciary duties[54] in its LLC agreement, Copano's LLC agreement did not provide for a managing member; rather it provided that its unitholders would directly elect the Copano board of directors, and that, except as otherwise specifically provided in the LLC agreement, Copano's directors and officers would owe fiduciary duties "identical to the fiduciary duties they would have as directors and officers of a Delaware corporation."[55]

This structure was fundamentally different than the sponsored MLP model. In fact, Copano's governance approach was effectively a corporate model: a board of directors—elected by the common equity holders and with Delaware corporate-style fiduciary duties to those common equity holders—that manages the business of the entity and stands for re-election annually. From a governance perspective, Copano can almost be viewed as a corporation with the special advantage of flow-through tax treatment. We will refer to this governance model as the "public LLC model."

Because Copano does not have a general partner or sponsor, its LLC agreement did not provide for a minimum quarterly distribution, incentive distribution rights, or subordinated units—attributes of sponsored MLPs that incentivize the general partner and the sponsor to grow the MLP and increase distributions. In other words, instead of being incentivized by the economic ramifications of the LLC agreement's contractual distribution provisions, the Copano board is incentivized—like the board of any other public corporation—by its prospects for re-election.

In January 2006, LINN Energy, LLC ("LINN") completed its initial public offering.[56] LINN also followed the public LLC model, with annually elected directors, no minimum quarterly distribution, and no subordinated units or IDRs. There-

51. *Id.* at 5–7. EOTT Energy LLC (later Link Energy LLC) may have actually been the first publicly traded energy MLP LLC, but it converted from a limited partnership MLP structure into an LLC structure in bankruptcy and did not try to offer publicly any securities to investors. *See* Link Energy, L.L.C., Annual Report (Form 10-K) (Mar. 30, 2004). Link Energy sold all of its assets and wound up its business in 2004. Link Energy, L.L.C., Current Report (Form 8-K) (Dec. 2, 2004).

52. Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (2005 & Supp. 2010).

53. *See, e.g.*, Niska Gas Storage Partners, L.L.C., Annual Report (Form 10-K), at 2 (June 15, 2011) (disclosing that this MLP is managed by a managing member and describing governance arrangements of the managing member substantially identical to the sponsored MLP model).

54. DEL. CODE ANN. tit. 6, § 18-1101(e) (2005).

55. Copano Energy, L.L.C., Second Amended and Restated Limited Liability Company Agreement § 7.1, Post-Effective Amendment No. 1 to Registration Statement (Form S-1/A), exh. 3.3 (Dec. 15, 2004) [hereinafter Copano LLC Agreement].

56. LINN Energy, L.L.C., Final Prospectus (Jan. 13, 2006).

after, a number of additional LLCs completed initial public offerings. Today there are five LLCs traded on the NYSE, NYSE Arca, or NASDAQ—Copano; LINN; NuStar GP Holdings, LLC ("NuStar GP"); Niska Gas Storage Partners, LLC ("Niska"); and Vanguard Natural Resources, LLC ("Vanguard").[57] Of these LLCs, LINN and Vanguard primarily own E&P assets, Copano primarily owns midstream assets, Niska owns natural gas storage assets, and NuStar GP is a publicly traded general partner, with its sole assets being general partner and limited partner interests in NuStar Energy, L.P. (which owns and operates asphalt refining assets as well as midstream assets). While one of these entities (Niska) is effectively a sponsored-style MLP in LLC form, with a "managing member" in the role of general partner, the other public LLCs have governance characteristics that diverge from the sponsored MLP model in the following significant ways:

*Directors Elected Annually by Public*. Copano, Linn, NuStar GP, and Vanguard have annual elections for directors.[58] NuStar GP has a classified board; the others elect the entire board each year.

*No Contractual Economic Incentives*. The LLC agreements of Copano, LINN, NuStar GP, and Vanguard have no provisions for minimum quarterly distributions, subordinated units, or incentive distribution rights.

*Sometimes, No "MLP Poison Pill*." While NuStar and Vanguard (like almost all sponsored MLPs) have an effectively impenetrable takeover defense (residing in a definitional voting rights concept wherein (1) only "outstanding" limited partner interests may vote and (2) any such limited partner interests held by a person or group that has acquired more than 20 percent of the total outstanding without the general partner's consent are deemed not to be outstanding and thus not eligible to vote),[59] Copano and LINN do not have that defense. Rather, those public LLCs are effectively in an identical position to a Delaware corporation without a poison pill but with the protections allowed by Delaware General Corporation Law ("DGCL") section 203.[60]

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57. Copano (NASDAQ: CPNO); LINN (NASDAQ: LINE); NuStar (NYSE: NSH); Niska (NYSE: NKA); Vanguard (NYSE Arca: VNR).

58. Copano LLC Agreement, *supra* note 55, § 7.1(c); LINN Energy, L.L.C., Third Amended and Restated Limited Liability Company Agreement § 7.1(c), Current Report (Form 8-K), exh. 3.1 (Sept. 7, 2010) [hereinafter LINN LLC Agreement]; Vanguard Natural Resources, L.L.C., Second Amended and Restated Limited Liability Company Agreement § 7.1(c), Current Report (Form 8-K), exh. 3.1 (Nov. 2, 2007) [hereinafter Vanguard LLC Agreement]; Valero GP Holdings, L.L.C., Second Amended and Restated Limited Liability Company Agreement § 7.1(c), Current Report (Form 8-K), exh. 3.1 (July 25, 2006) [hereinafter NuStar GP LLC Agreement].

59. *See, e.g.*, Western Gas LP Agreement, *supra* note 40, § 1.1 (defining "Outstanding").

60. Both Copano and LINN have a provision in their LLC Agreements that is equivalent to DGCL section 203, which is available to public corporations. Copano LLC Agreement, *supra* note 55, § 7.2; LINN LLC Agreement, *supra* note 58, § 7.2. NuStar GP and Vanguard have the traditional MLP poison pill in their LP agreements. NuStar GP LLC Agreement, *supra* note 58, § 1.1; Vanguard LLC Agreement, *supra* note 58, § 1.1. DGCL section 203, if adopted by a Delaware corporation, prohibits for three years certain business combinations between that corporation and its "interested stockholders" unless prior board approval is obtained or other exceptions apply. DEL. CODE ANN. tit. 8, § 203 (2011).

*Director Fiduciary Duties*. The LLC agreements for Copano, LINN, and NuStar GP all provide that their directors (sometimes called "managers") owe fiduciary duties similar to those imposed under the DGCL.[61] For example, the LINN Energy LLC agreement provides that:

> Except as otherwise specifically provided in this Agreement, the authority and functions of the Board of Directors, on one hand, and of the Officers, on the other, shall be identical to the authority and functions of the board of directors and officers, respectively, of a corporation organized under the DGCL.[62]

The LLC agreements governing public LLCs also provide exculpation for certain breaches of fiduciary duty, which are similar to those available to corporations under the DGCL. For example, the LINN Energy LLC Agreement also provides that

> [n]otwithstanding anything to the contrary set forth in this Agreement, no Director shall be liable to the Company or the Members for monetary damages for breach of fiduciary duty as a Director, except (i) for a breach of the Director's duty of loyalty to the Company or the Members; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (iii) for any transaction from which the Director derived an improper personal benefit.[63]

This limitation of liability is essentially identical to that permitted for corporate directors under section 102(b)(7) of the DGCL. The significant difference between this arrangement and that in the LP agreement for a typical sponsored MLP is that in the public LLC model, the duty of loyalty remains intact, while in the sponsored MLP model, that duty is replaced with a duty to act in good faith.

The LINN Energy LLC Agreement also:

- provides that LINN Energy will indemnify each of its directors against any losses, expenses, or damages incurred "so long as that director acted in good faith and in a manner [he] reasonably believed to be in or not opposed to the best interests of LINN Energy and, with respect to any criminal action or proceeding, had no reasonable cause to believe that [his] conduct was unlawful";[64]

- waives the directors' obligations to present business opportunities to the LLC;[65] and

61. Copano LLC Agreement, *supra* note 55, § 7.10(a); NuStar GP LLC Agreement, *supra* note 58, § 7.10(a); LINN LLC Agreement, *supra* note 58, § 7.10(a).

62. LINN LLC Agreement, *supra* note 58, § 7.1(a).

63. *Id.* § 7.8(a).

64. *Id.* § 7.7(a).

65. *Id.* § 7.5.

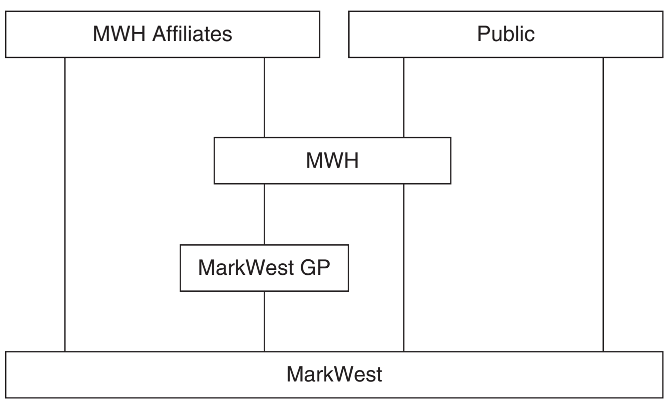
- provides for a "Special Approval" process identical to the sponsored MLP model[66] under which a transaction involving an interested director may be "deemed approved."[67]

These provisions are consistent with those contained in the LLC agreements of the other public LLCs as well.

## B. GP Tuck-In Transactions

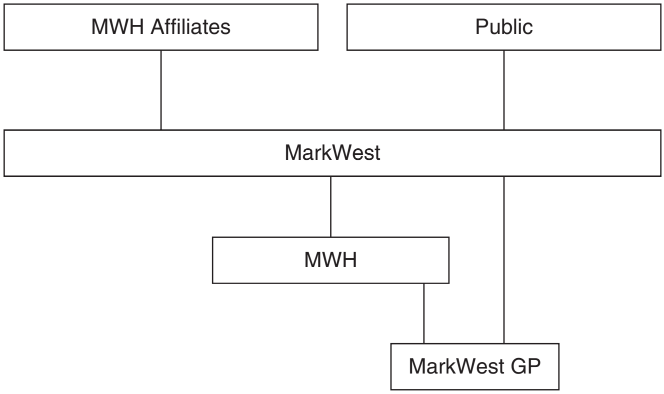
The second significant change to the sponsored MLP governance model took place in 2008, when MarkWest Energy Partners, L.P. ("MarkWest") acquired MarkWest Hydrocarbon, Inc. ("MWH") via merger.[68] MWH, the target in the transaction, was MarkWest's sponsor. It owned MarkWest's general partner and all of the incentive distribution rights in MarkWest.[69] Accordingly, following the transaction, MarkWest owned MWH, which meant that MarkWest indirectly owned its own general partner[70]—this type of transaction is generally referred to as a "GP tuck-in transaction" because the general partner is "tucked-in" under the LP. The following is a simplified chart showing the ownership of MarkWest before and after the transaction:

**Before Transaction**[71]




66. For a discussion of the special approval process under the sponsored MLP model, see Goodgame, *supra* note 1, at 494–98.
67. LINN LLC Agreement, *supra* note 58, § 7.9.
68. MarkWest Energy Partners, L.P., Annual Report (Form 10-K), at 4–6 (Mar. 2, 2009).
69. *Id.*
70. *Id.*
71. MarkWest Energy Partners, L.P. and MarkWest Hydrocarbon, Inc. Joint Proxy Statement/Prospectus 32 (Jan. 8, 2008).

**After Transaction**[72]




The MarkWest transaction resulted in a governance model that was closer to the public LLC model than to the sponsored MLP model. Following that transaction, a number of other sponsored MLPs underwent GP tuck-in transactions over the next few years. Each of these GP tuck-in transactions had many similar characteristics. They all resulted in (1) unitholder election of the general partner board of directors; (2) cancellation of the IDRs; and (3) removal or conversion of any subordinated units. However, the resulting governance arrangements had a number of significant differences as well.

As of December 31, 2011, there were seven LPs traded on the NYSE, AMEX, or NASDAQ with tucked-in general partners—BreitBurn Energy Partners, L.P. ("BreitBurn"); Buckeye Partners, L.P. ("Buckeye"); Eagle Rock Energy Partners, L.P. ("Eagle Rock"); Genesis Energy, L.P. ("Genesis"); Magellan Midstream Partners, L.P. ("Magellan"); MarkWest; and Penn Virginia Resource Partners, L.P. ("Penn Virginia").[73] Like the public LLCs, these LPs (which we will refer to as tucked-in MLPs) do not have consistent asset bases: BreitBurn has E&P assets;[74] Buckeye, Magellan, and MarkWest have midstream assets;[75] Penn Virginia has coal and midstream assets;[76] and Eagle Rock has E&P and midstream assets.[77] Like the public LLCs, these LPs have:

72. *Id.*

73. BreitBurn (NASDAQ:BBEP); Buckeye (NYSE:BPL); Eagle Rock (NASDAQ:EROC); Genesis (NYSE:GEL); Magellan (NYSE:MMP); MarkWest (AMEX:MWE); and Penn Virginia (NYSE:PVR).

74. BreitBurn Energy Partners, L.P., Annual Report (Form 10-K), at 4 (Feb. 29, 2012) [hereinafter BreitBurn 10-K].

75. Buckeye Energy Partners, L.P., Annual Report (Form 10-K), at 4 (Feb. 2, 2012); Magellan Midstream Partners, L.P., Annual Report (Form 10-K), at 4 (Feb. 12, 2012); MarkWest Energy Partners, L.P., Annual Report (Form 10-K), at 5 (Feb. 28, 2012).

76. Penn Virginia Resource Partners, L.P., Annual Report (Form 10-K), at 3 (Feb. 24, 2012).

77. Eagle Rock Energy Partners, L.P., Annual Report (Form 10-K), at 5 (Feb. 10, 2012).

- annually elected directors;[78] and
- no subordinated units, IDRs, minimum quarterly distribution requirements, or other similar contractual economic incentives.

Unlike some of the public LLCs, the tucked-in MLPs have MLP-style poison pills[79] and, instead of using the DGCL as a reference point for director duties, the tucked-in MLPs include MLP-style director duty provisions (generally eliminating all fiduciary duties and requiring only that the directors act in accordance with a contractually defined "good faith" standard)[80] in their LP agreements. In addition, unlike the majority of the public LLCs, most of these LPs have classified boards[81] and some have reserved board seats for the former owner of the general partner, subject to maintenance of a sufficient percentage of the outstanding common units.[82]

### C. Sponsored Model with No Contractual Economic Incentives

In November 2010, Enterprise Products Partners, L.P. ("Enterprise") acquired Enterprise GP Holdings LP, the owner of the general partner of Enterprise. As a result of this transaction, Enterprise's IDRs were cancelled and its 2 percent general partner interest was converted into a non-economic interest.[83] Unlike the other recent GP-related transactions, however, in this transaction ownership of the general partner interest was transferred to Enterprise's sponsor (Enterprise Products Company, a private company and previously the owner of the general

78. BreitBurn Energy Partners, L.P., First Amended and Restated Agreement of Limited Partnership § 13.4(b)(i), Current Report (Form 8-K), exh. 3.1 (Oct. 16, 2006) [hereinafter BreitBurn LP Agreement], *amended by* Amendment No. 1 to BreitBurn LP Agreement (June 23, 2008), Amendment No. 2 to BreitBurn LP Agreement (Apr. 9, 2009), Amendment No. 3 to BreitBurn LP Agreement (Sept. 1, 2009), and Amendment No. 4 to BreitBurn LP Agreement (Apr. 9, 2010); Buckeye Energy Partners, L.P., Amended and Restated Agreement of Limited Partnership § 16.1(b)(iv), Current Report (Form 8-K), exh. 3.1 (Nov. 22, 2010) [hereinafter Buckeye LP Agreement]; Eagle Rock Energy Partners, L.P., Second Amended and Restated Agreement of Limited Partnership § 13.4(c), Current Report (Form 8-K), exh. 3.1 (May 25, 2010) [hereinafter Eagle Rock LP Agreement]; Magellan Midstream Partners, L.P., Fifth Amended and Restated Agreement of Limited Partnership, Current Report (Form 8-K), exh. 3.1 (Sept. 30, 2009) [hereinafter Magellan LP Agreement], *amended by* Amendment No. 1 to Magellan LP Agreement (Oct. 28, 2011); MarkWest Energy Partners, L.P., Third Amended and Restated Agreement of Limited Partnership, Current Report (Form 8-K), exh. 3.1 (Feb. 21, 2008) [hereinafter MarkWest LP Agreement]; Penn Virginia Resource Partners, Fourth Amended and Restated Agreement of Limited Partnership, Current Report (Form 8-K), exh. 3.1 (Mar. 11, 2011) [hereinafter Penn Virginia LP Agreement]; Genesis's board is elected solely by the (non-publicly-traded) holders of its Class B common units. Genesis Energy, L.P., Fifth Amended and Restated Agreement of Limited Partnership § 13.4(b), Current Report (Form 8-K), exh. 3.1 (Jan. 3, 2011) [hereinafter Genesis LP Agreement].

79. *See, e.g.*, BreitBurn LP Agreement, *supra* note 78, § 13.4(b)(iii), (vii) (using the term "Outstanding").

80. *Id.* § 7.9.

81. *Id.* § 13.4(b)(iv); Buckeye LP Agreement, *supra* note 78, § 16.1(b)(iv), (vi)–(vii); Eagle Rock LP Agreement, *supra* note 76, § 13.13; Magellan LP Agreement, *supra* note 78, § 13.4(b)(iv); Penn Virginia LP Agreement, *supra* note 78, § 13.4(b)(v).

82. *See, e.g.*, Buckeye LP Agreement, *supra* note 78, § 16.1(b)(iv); Eagle Rock LP Agreement, *supra* note 78, § 13.13(a).

83. Enterprise Products 10-K, *supra* note 27, at 1.

partner interest in Enterprise GP Holdings LP), which thus continued to maintain sole control of Enterprise's general partner (and thus control of the election of its board of directors) following the closing. While the general partner's interest became a non-economic interest, it had the same control rights as it held pre-transaction.[84] As a result, Enterprise retained a portion of the sponsored MLP governance model (firm control of governance in the hands of the sponsor) but removed some of the incentive structure previously associated with that model.

Even with a reduced incentive structure, Enterprise's sponsor is likely to be viewed as sufficiently aligned with Enterprise's common unitholders because Enterprise Products Company and its affiliates owned almost 38 percent of the outstanding common units on January 31, 2012[85] with a market value of almost $17 billion as of March 27, 2012. As a result, any action taken by the general partner or the sponsor to disadvantage the Enterprise common units would likely severely injure the economic interests of the general partner and the sponsor as well.

Pioneer Southwest Energy Partners, L.P. ("Pioneer Southwest") went public with a similar "modified sponsored" structure in 2008.[86] Pioneer Southwest's general partner, which is controlled by Pioneer Natural Resources Company ("Pioneer"), a public E&P company, holds a 0.1 percent general partner interest, no IDRs, and no subordinated units.[87] Pioneer Southwest's general partner also has the control rights typical of a sponsored MLP. But following the Pioneer Southwest IPO, Pioneer owned over 70 percent of the outstanding common units of Pioneer Southwest;[88] accordingly, like Enterprise, one could view the sponsor's interests as being generally aligned with the interests of the common unitholders.

It remains to be seen whether the modified sponsored model will find long-term favor with investors. One could expect that a sell-down by the sponsor of a significant portion of its common units would have a detrimental effect on the market value of the common units because the entity controlling the MLP would be viewed as less aligned with the limited partners; as a result, it is likely that this structure will be limited to MLPs with sponsors that are viewed as long-term players in their particular industries and with substantial relationships to the MLPs (as opposed to private equity sponsors who may be viewed by the market as ultimately looking to exit the entire investment).

### D. Additional Variations on the Traditional Sponsored MLP Model

In recent years a few MLPs have completed initial public offerings with governance models also slightly different from the traditional sponsored MLP model. This section discusses those variations.

84. *Id.*
85. *Id.* at 140.
86. Pioneer Southwest Energy Partners, L.P., Final Prospectus 2 (May 1, 2008).
87. Pioneer Southwest Energy Partners, L.P., Annual Report (Form 10-K), at 1–3 (Feb. 29, 2012).
88. *Id.* at 6 (stating that as of December 31, 2011, Pioneer Natural Resources Co. owned 52.5 percent of Pioneer Southwest Energy Partners).

*QR Energy*. QR Energy, L.P. ("QR Energy") completed its initial public offering in December 2010. QR Energy owns E&P assets[89] and has a mostly typical sponsored MLP structure, with a sponsor-owned general partner, a minimum quarterly distribution, and subordinated units, but instead of IDRs, QR Energy has a "management incentive fee." The management incentive fee is payable to the general partner for each quarter in which the cash distributions paid to the limited partners equal or exceed 115 percent of the minimum quarterly distribution, and is equal to 0.25 percent of (i) the future net revenue of QR Energy's estimated proved reserves, determined in accordance with SEC methodology and adjusted for QR Energy's commodity derivative contracts, plus (ii) the fair market value of QR Energy's other assets.[90] The existence of that fee certainly incentivizes the QR Energy general partner to make and maintain distributions of at least 115 percent of the minimum quarterly distribution; however, unlike traditional incentive distribution rights it does not necessarily provide the same incentive to increase distributions beyond that point[91]—in fact, it could be argued that only unit price considerations would incentivize the general partner to increase distributions beyond that point.

*Variable Distribution MLPs*. In 2011–2012, four "variable distribution" MLPs completed initial public offerings. CVR Partners, L.P. ("CVR Partners")[92] and Rentech Nitrogen Partners, L.P. ("Rentech")[93] are both in the nitrogen fertilizer business, and are both controlled by general partners owned by more substantial sponsors.[94] PetroLogistics, L.P. ("PetroLogistics")[95] is in the petrochemical[96] business, and is controlled by a general partner owned primarily by an individual investor and a private equity firm.[97] Northern Tier Refining ("Northern Tier")[98] is in the petroleum refining[99] business, and is controlled by a general partner owned primarily by two private equity firms.[100] These four MLPs are fundamentally in a different business than the other energy MLPs discussed in this article; the nitrogen fertilizer, petrochemical, and refining businesses are

89. QR Energy, L.P., Annual Report (Form 10-K), at 9 (Mar. 15, 2012).

90. QR Energy, L.P., Final Prospectus 94 (Dec. 17, 2010).

91. *See id*. at 51–52 (stating as a risk factor that "[t]he Management Incentive Fee We Will Pay to Our General Partner May Increase in Situations Where There Is No Corresponding Increase in Distributions to Our Common Unitholders").

92. NYSE: UAN.

93. NYSE: RNF.

94. CVR Partners, L.P., Final Prospectus 1–12 (Apr. 11, 2011) [hereinafter CVR Partners Prospectus]; Rentech Nitrogen Partners, Final Prospectus 1–20 (Nov. 7, 2011) [hereinafter Rentech Prospectus].

95. NYSE: PDH.

96. Specifically, propane dehydration, which is the processing of propane, a natural gas liquid, into propylene. PetroLogistics, L.P., Final Prospectus 93 (May 7, 2012) [hereinafter PetroLogistics Prospectus].

97. *See id*. at 10.

98. NYSE: NTI.

99. Northern Tier Energy LP, Final Prospectus 1 (July 27, 2012) [hereinafter Northern Tier Prospectus].

100. *Id*. at 9–10.

very cyclical and volatile[101] and, unlike the E&P business, effective hedging arrangements are apparently not available in the fertilizer or petrochemical businesses to make cash flows more predictable and steady. Accordingly, the economic structure of these MLPs is different.

Most of the variable distribution MLPs are obligated by the terms of their LP agreements to distribute all Available Cash generated each quarter,[102] but at that point the contractual economic incentives diverge from the traditional sponsored model. Instead:

- The general partner has a non-economic interest[103] (meaning that the general partner does not receive any proportional amount of cash distributed to the limited partners);[104]
- No subordinated units are issued to the general partner or the sponsor; rather, the sponsor and its affiliates own the same equity security (common units) as the public;[105]
- No minimum quarterly distributions are required;
- No incentive distribution rights or QR Energy-style management incentive fee exist; and
- An intention for cash distribution amounts to vary from quarter to quarter is expressed.[106]

101. *See, e.g.*, CVR Partners Prospectus, *supra* note 94, at 19 (noting that the nitrogen fertilizer business "has been volatile historically as a result of volatile nitrogen fertilizer and natural gas prices, and seasonal and global fluctuations in demand for nitrogen fertilizer products"); PetroLogistics Prospectus, *supra* note 96, at 23 (including a risk factor entitled "[t]he propylene business is, and propylene prices are, cyclical and highly volatile and have experienced substantial downturns in the past. Cycles in demand and pricing could potentially expose us to significant fluctuations in our operating and financial results, and expose you to substantial volatility in our quarterly cash distributions and material reductions in the trading price of our common units.").

102. CVR Partners Prospectus, *supra* note 94, at 9; Rentech Prospectus, *supra* note 92, at 16; PetroLogistics Prospectus, *supra* note 96, at 51.

103. CVR Partners Prospectus, *supra* note 94, at 12; Rentech Prospectus, *supra* note 94, at 20; PetroLogistics Prospectus, *supra* note 96, at 10; Northern Tier Prospectus, *supra* note 99, at 12.

104. But note that the general partner does receive reimbursement for costs and expenses incurred in managing the MLP. CVR Partners Prospectus, *supra* note 94, at 158; Rentech Prospectus, *supra* note 94, at 209; PetroLogistics Prospectus, *supra* note 96, at 52; Northern Tier Prospectus, *supra* note 99, at 197.

105. *See* sources cited at *supra* note 103.

106. *See* CVR Partners Prospectus, *supra* note 94, at 18 (stating as a risk factor that "[t]he amount of our quarterly cash distributions, if any, will vary significantly both quarterly and annually and will be directly dependent on the performance of our business. Unlike most publicly traded partnerships, we will not have a minimum quarterly distribution or employ structures intended to consistently maintain or increase distributions over time."); Rentech Prospectus, *supra* note 94, at 27 (stating as a risk factor that "[t]he amount of our quarterly cash distributions, if any, will vary significantly both quarterly and annually and will be directly dependent on the performance of our business. Unlike most publicly traded limited partnerships, we will not have a minimum quarterly distribution or employ structures intended to consistently maintain or increase distributions over time."); PetroLogistics Prospectus, *supra* note 96, at 21 (stating a risk factor entitled "[t]he amount of our quarterly cash distributions, if any, will vary significantly both quarterly and annually and will be directly dependent on the performance of our business. Unlike most publicly traded partnerships, we will not have a minimum quarterly distribution or employ structures intended to consistently maintain or increase

The final IPO prospectus for each of these MLPs clearly warns potential investors that they are not looking at a traditional MLP. For example, the Rentech prospectus warns that:

> Investors who are looking for an investment that will pay regular and predictable quarterly distributions should not invest in our common units. We expect our business performance will be more seasonal and volatile, and our cash flow will be less stable, than the business performance and cash flow of most publicly traded limited partnerships. As a result, our quarterly cash distributions will be volatile and are expected to vary quarterly and annually. Unlike most publicly traded limited partnerships, we will not have a minimum quarterly distribution or employ structures intended to consistently maintain or increase distributions over time. The amount of our quarterly cash distributions will be directly dependent on the performance of our business, which has been volatile historically . . . .[107]

At the completion of the initial public offering for these four MLPs, the sponsor and its affiliates owned approximately 61 percent (Rentech),[108] 74 percent (CVR Partners), 75 percent (PetroLogistics), and 82 percent (Northern Tier)[109] of the outstanding common units; accordingly, the incentive structure for these MLPs is similar to the "modified sponsored" model of Enterprise and Pioneer Southwest, in that the sole economic incentive for the general partner and sponsor to pay, maintain, or increase cash distributions lies in the general partner's and sponsor's ownership of common units that benefit and suffer alongside those owned by the public. And as with Enterprise and Pioneer Southwest, it remains to be seen how this arrangement would be viewed by the marketplace if the sponsor sold down a significant amount of its common units. It also remains to be seen whether MLP investors will tolerate the significant variability in cash distributions contemplated by these investments over the long term.

## IV. Will Changes in MLP Structures Cause Changes in Governance?

As most every MLP common unit prospectus says, generally at the beginning of the "Risk Factors" section, "[l]imited partner interests are inherently different from the capital stock of a corporation."[110] This fact remains true notwithstanding the recent developments in MLP governance structures, even those that on the surface appear to move the governance model more toward the corporate standard. While one might think that changes in governance arrangements

distributions over time."); Northern Tier Prospectus, *supra* note 99, at 28–29 (stating as a risk factor that "[t]he amount of our quarterly distributions, if any, will vary significantly both quarterly and annually and will be directly dependent on the performance of our business. Unlike most publicly traded partnerships, we will not have a minimum quarterly distribution or employ structures intended to consistently maintain or increase distributions over time.").

107. *See supra* note 106.

108. Rentech Prospectus, *supra* note 94, at 20.

109. Northern Tier Prospectus, *supra* note 99, at 12.

110. *See, e.g.*, Memorial Production Partners, L.P., Final Prospectus 24 (Dec. 9, 2011).

would follow changes in MLP structures and the MLP marketplace, it appears unlikely that any significant variations will result.

### A. Institutional Investors Have Become More Powerful

From 2004 through 2012, the MLP equity marketplace has gone from completely retail to a market with significant participation by institutional investors.[111] As of March 27, 2012, there were twenty-six funds and registered investment companies that hold MLPs, as well as nine exchange-traded funds and exchange-traded notes focused on MLPs.[112] As of March 21, 2012, these institutions collectively owned approximately 31 percent of all outstanding MLP equity securities.[113] While no pressure has been applied publicly by any of these institutions regarding MLP governance practices, the author can attest that a number of these institutions are very vocal during the initial public offering process for MLPs, and that they can and do influence some of the offering or governance terms before the IPO is completed. Additionally, as these institutions are the major providers of privately placed equity capital to MLPs,[114] MLPs are likely to be very sensitive to any privately or publicly voiced governance concerns.

### B. As the Marketplace Understands Certain New MLP Structures, Governance Changes May Be Required

LPs are currently exempted from many NYSE and NASDAQ rules[115] in the same manner as "controlled companies" (listed companies "of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company"[116]). For example, LPs are not required to have

- a majority of independent directors;[117]
- a nominating/corporate governance committee; or
- a compensation committee.

This is understandable where the LP has a governance arrangement consistent with the sponsored model—whether modified or otherwise—because (like a

111. *See, e.g.*, Conrad S. Ciccotello, *Why Financial Institutions Matter: The Case of Energy Infrastructure MLPs*, J. Applied Corp. Fin., Summer 2011, at 86.

112. *See PTPs Currently Traded on U.S. Exchanges*, Nat'l Ass'n of Pub. Traded P'ships, http://www.naptp.org/PTP101/CurrentPTPs.htm (last visited Mar. 27, 2012).

113. Tudor, Pickering, Holt & Co., LLC, Presentation on Institutional Investment in Midstream & MLPs 1 (2012) (on file with *The Business Lawyer*).

114. Ciccotello, *supra* note 111, at 87–88.

115. NYSE, Inc., Listed Company Manual § 303A (2009); NASDAQ, Inc., Listing Rule 5615(a)(4) (2008). Note that LLCs do not enjoy the benefit of this exemption.

116. NYSE, Inc., Listed Company Manual § 303A (2009); *see also* NASDAQ, Inc., Listing Rule IM-5615-5 (2011).

117. LPs are required to have a sufficient number of independent directors to have a fully staffed audit committee.

controlled company) the sponsor has bargained for control of the LP, and the marketplace fully understands that arrangement.

But it is unclear whether these exemptions make sense for tucked-in MLPs, because those LPs are more analogous to public LLCs from a governance perspective than to sponsored MLPs. This reality may be why, for example, the restated LP Agreement for MarkWest that was approved by its unitholders in connection with the "tucking in" of its general partner included the following provision:

> The corporate governance of the Partnership, the General Partner or the Board of Directors shall be governed by all applicable rules, regulations, guidelines or requirements of the National Securities Exchange on which such Partnership Interests are listed for trading *without regard to any exemptions provided to limited partnerships under such National Securities Exchange*.[118]

It may be that the exchange requirements will be revised to exempt only those LPs whose general partner is a "controlled company"; however, any such revision would likely have little immediate practical effect because most of the tucked-in MLPs have a majority of independent directors, and many have nominating or compensation committees.[119]

In addition, though corporate America has certainly been pressured by its shareholders to remove the previously standard traditional takeover protections—classified boards and poison pills most specifically—those types of protections are certainly present in many MLPs with governance arrangements that are otherwise closer to the corporate model.[120] It is entirely possible that the increased presence of institutional investors, on the one hand, and more MLPs with elected boards, on the other hand, may lead to increased marketplace focus on removing takeover protections and aiding additional unitholder influence for public LLCs and tucked-in MLPs.

However, any marketplace pressure applied to MLPs for what are today called "good governance" reforms will be subject to a number of limitations and ultimately unlikely to succeed. First and most directly, most public LLCs and all LPs have the existing MLP poison pill, where generally if "any Person or Group beneficially owns twenty percent or more of any Outstanding Partnership Securities of any class then Outstanding, all Partnership Securities owned by

118. MarkWest LP Agreement, *supra* note 78, § 7.1.

119. BreitBurn 10-K, *supra* note 74, at 63 (exhibiting a board with a majority of independent directors); Buckeye Energy Partners, L.P., Proxy Statement (Schedule 14A), at 6, 8 (Apr. 25, 2011) (exhibiting a board with a majority of independent directors, including on the nominating, corporate governance, and compensation committees); Eagle Rock Energy Partners, L.P., Proxy Statement (Schedule 14A), at 6, 8 (Apr. 27, 2011) (exhibiting a board with a majority of independent directors, including the nominating, corporate governance, and compensation committees); Genesis Energy, L.P., Annual Report (Form 10-K), at 68 (Feb. 29, 2012) (exhibiting a governance and compensation committee entirely comprised of independent directors); Magellan Midstream Partners, L.P., Proxy Statement (Schedule 14A), at 3–5 (Feb. 24, 2012) (exhibiting a board comprised of a majority of independent directors, including the compensation committee); Penn Virginia Resource Partners, L.P., Proxy Statement (Schedule 14A), at 3–5 (Apr. 29, 2011) (exhibiting a board with a majority of independent directors, including the compensation committee).

120. *See supra* notes 50–82 and accompanying text.

such Person or Group shall not be voted on any matter and shall not be considered to be Outstanding."[121]

Second, the nature of a limited partnership itself limits the ability of limited partners to change fundamentally the management of an MLP. Section 17-303(a) of DRULPA provides that a limited partner is not liable for the obligations of a limited partnership unless "he or she participates in the control of the business."[122] While that section includes a list of actions that may be taken by limited partners that do not constitute "participating in the control" of the limited partnership's business,[123] limited partners will rightly be very cautious in taking any action that may jeopardize the limited liability shield that is expected of public companies. In addition, each tucked-in MLP has a provision in its LP agreement that provides some variant of the following:

> The exercise by a Limited Partner of the right to elect the Directors and any other rights afforded to such Limited Partner under this Section [] shall be in such Limited Partner's capacity as a limited partner of the Partnership and shall not cause a Limited Partner to be deemed to be taking part in the management and control of the business and affairs of the Partnership so as to jeopardize such Limited Partner's limited liability under the Delaware Act or the law of any other state in which the Partnership is qualified to do business.[124]

While this provision is written as "protective"—that is, on its face it states that the acts of the limited partners "shall not" cause a loss of limited liability—it arguably should also be read as prescriptive, saying that limited partners cannot take activities that would cause a loss of limited liability.

Finally, any market pressure on MLP governance (including any pressure relating to hostile takeover activity) should be viewed in the light of the general waiver of fiduciary duties present in those MLPs' LP agreements. Even the tucked-in MLPs generally include provisions that provide a contractual good-faith standard rather than a corporate-style common law fiduciary duty standard.[125] Accordingly, the directors of tucked-in MLPs would not likely have corporate-style duties, and should likely be able to maintain the governance status quo so long as they believe it to be in the best interest of the MLP. For example, the LP agreement of Eagle Rock provides

- the general partner's consent is required for any amendment to the LP agreement, and the Board has no fiduciary or other obligation to approve any such amendment;[126]
- only limited partners holding at least 20 percent of the outstanding units may nominate directors for election or call meetings of the limited partners;[127]

121. *See, e.g.*, Western Gas LP Agreement, *supra* note 40, § 1.1.
122. Del. Code Ann. tit. 6, § 17-303(a) (2005).
123. Del. Code Ann. tit. 6, § 17-303(b) (2005 & Supp. 2010).
124. *See, e.g.*, Magellan LP Agreement, *supra* note 78, § 13.4(c)(ii).
125. *See, e.g.*, *id.* §§ 7.7–7.9.
126. Eagle Rock LP Agreement, *supra* note 78, § 13.2.
127. *Id.* § 13.4(c)(iv).

- other than director nominations, only the board of directors of the general partner may propose matters to be voted on at unitholder meetings;[128]
- the directors' fiduciary duties are waived to the fullest extent permitted by law and replaced with an obligation to act in good faith;[129] and
- the general partner's consent is required for any merger involving the Partnership, and the general partner has (and thus the directors have) no "duty or obligation to consent to any merger [] and may decline to do so free of any fiduciary duty or obligation whatsoever."

The ultimate result of these provisions (and the substantially identical provisions in the other tucked-in MLPs and many public LLCs), as well as the other limitations described above, is that the exertion by investors of marketplace pressure (other than the economic pressure—i.e., sales of or refusal to buy MLP securities) on MLPs will be very difficult and unlikely to yield substantial results, regardless of structure. And, so long as MLPs continue to generate good returns relative to other yield-based investment options, it is unlikely in any event that any significant pressure will be applied.

128. *Id.* § 13.4(c)(i).
129. *Id.* § 7.9(b), (e).