

New Federal Initiatives Project

**Criminal Provision in
the Cap and Trade Bill**

**By
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Criminal Provision in the Cap and Trade Bill

A review of the latest “discussion draft” of the American Power Act¹ better known as “cap and trade” legislation, reveals no direct specific criminal provisions. The discussion draft, however, creates a “greenhouse gas instrument” market – a market for trading emissions credits that is described in detail in another Federalist Society New Federal Initiatives Project Paper.² The discussion draft places the greenhouse gas instrument market squarely in the Commodity Exchange Act.³ The Commodity Exchange Act itself is a comprehensive statutory scheme that includes numerous criminal penalties.⁴ More generally, the Commodity Exchange Act makes the willful commission of all acts designated as “unlawful” by the Act felonies.⁵

The interaction between the Commodity Exchange Act and the American Power Act would cause many activities to be characterized as criminal. Specifically, the discussion draft would make the following acts not just crimes, but felonies, if done willfully:

1. Excessive speculation in violation of Commodity Futures Trading Commission rules⁶
2. Fraud or false statements⁷
3. Entering the greenhouse gas instrument market without registering with the Commodity Futures Trading Commission and complying with its rules⁸
4. Allowing statutorily disqualified persons to participate in the activities of registered greenhouse gas instrument market participants⁹
5. Acting as a greenhouse gas clearing organization without Commission approval¹⁰

In addition, the draft would extend criminal liability to manipulating prices, cornering the market, or making false statements about market conditions to the greenhouse gas instrument market.¹¹ It would also extend criminal liability for violating a cease and desist order to the greenhouse gas instrument market.¹²

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¹ The text can be viewed online at: <http://kerry.senate.gov/imo/media/doc/APAbill3.pdf>.

² *American Power Act: Senators Kerry and Lieberman Release “Discussion Draft” of New Climate Change Bill*, Rogers, Alec and Wood, Jeffrey: http://www.fed-soc.org/publications/pubid.1907/pub_detail.asp

³ 7 U.S.C. § 1 *et seq.*

⁴ *See, e.g.*, 7 U.S.C. § 13(a) (felony punishable by up to ten years in prison to steal, manipulate prices, commit fraud, or make false statements in the context of commodity exchanges), § 13b (failure to comply with a cease and desist order).

⁵ 7 U.S.C. § 13(a)(5).

⁶ 7 U.S.C. § 2404.

⁷ 7 U.S.C. § 2405.

⁸ 7 U.S.C. § 2408.

⁹ 7 U.S.C. § 2409.

¹⁰ 7 U.S.C. § 2411.

¹¹ 7 U.S.C. § 2407.

¹² 7 U.S.C. § 2407.

Related Links:

“American Power Act: Senators Kerry and Lieberman Release ‘Discussion Draft’ of New Climate Change Bill” by Alec Rogers and Jeff Wood: http://www.fed-soc.org/publications/pubid.1907/pub_detail.asp