



# S.8008 / A.9008 (Budget), Part EEE

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<b>BILL</b> S.8008 / A.9008 (Budget), Part EEE
<b>SUBJECT</b> Building Code Update and “All Electric Building” Mandate
<b>DATE</b> March 02, 2022
<b>OPPOSE</b>

While we can support some elements of Part EEE, which makes numerous updates to the state energy code and imposes a new building benchmarking mandate.

However, we oppose its adoption as proposed for several reasons.

## 1. Zero-Emission Buildings

The bill provides, in its proposed amendments to §11-104 of the Energy Law, that the state energy conservation and construction code should “to the fullest extent feasible . . . require new construction statewide to have zero onsite greenhouse gas emissions no later than the year two thousand twenty-seven.” Addressing greenhouse gas emissions from buildings is a major component of the draft Climate Action Council scoping plan that is currently undergoing public review and comment (with the comment period currently open through April 31, 2022.) The draft scoping plan proposes a detailed plan for building emissions, related to expanded electrification, improved efficiency, and others. However, since the scoping plan provides a comprehensive approach for the state, with significant interrelationship of sector-specific proposals, we do not believe that the state should be adopting individual components as stand-alone measures. Even if the legislature supported early action on electric building legislation, the grant of regulatory authority proposed in Part EEE is way too broad and vague. It says nothing about the scope of the mandate, exemptions, phase-in schedule or other key elements of a thoughtful, more workable mandate. We strongly oppose legislation that would impose this significant a mandate in such an imprecise manner.

## 2. Scope of Regulatory Authority

The bill provides, in its amendments regarding appliance and equipment efficiency standards, to amend Energy Law §16-606 to authorize NYSERDA, in

consultation with the Secretary of State to “adopt regulations establishing efficiency standards for **products** other than motor vehicles not specifically listed” in §16-606 (including the expanded list proposed in this bill.)

We have two concerns regarding this provision. First, as a policy matter, it provides excessively broad delegation of regulatory authority to allow NYSERDA to apply standards to virtually any category of product used in buildings. We believe this regulatory authority should be limited to product categories specifically designated by the legislature, as is being proposed elsewhere in Part EEE.

Second, and more important, this broad delegation of regulatory authority could be interpreted as extending to products that constitute industrial and commercial processes. Neither current Article 16 nor this legislation include a definition of the term “product” or “products.” The nearest that the Energy Law comes to doing so is in its provisions regarding the state construction code, in Article 11, which is applicable to the construction of new buildings and the addition to, and alteration of, any existing building or building system. This provision defines “building” as “Any structure used or intended for supporting or sheltering any use or occupancy . . . **including any equipment therein,**” and goes on in its definition of “equipment” to **exclude “any items constituting an industrial or commercial process.”** The CAC scoping plan’s proposals for the industrial sector recognizes “the heterogenous nature of industry, and the resulting need for customized solutions on an industry-specific and even factory-specific basis.” We do not believe industrial processes should be subject to generally applicable energy efficiency standards adopted through the state’s building code process.

At minimum, if the legislature grants the broad regulatory authorization proposed in these amendments to §16-606, it should provide a limit on the scope of NYSERDA’s regulatory authority by defining “product” as excluding “any items constituting an industrial or commercial process.”

### **3. New Building Benchmarking Mandate**

We have several concerns regarding this bill’s building benchmarking proposal set forth in §25 of Part EEE. First, the bill would require benchmarking to be done using the EPA Energy Star portfolio manager tool (or a similar tool approved by NYSERDA). That is a well-known, well respected and widely used assessment tool that, among other things, produces a building score on a 1 to 100 scale that can be used for comparisons within a category of business. The bill would require annual publication of building-specific “public benchmarking

information” that shall include, but not be limited to, the Energy Star score, as well as facility descriptive information and **“output information, including site and source energy use intensity.”** If the state is to adopt a benchmarking mandate, with public disclosure requirements, it needs to avoid requiring publication of detailed production and energy consumption information that could constitute business confidential data. While the bill states that benchmarking information held by state agencies is subject to, among other provisions of law, the protections under Public Officers Law Article 6 that precludes disclosure of records that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” We agree that the limitations under the state’s FOIL laws would apply to any benchmarking data, which supports our position regarding further limitations on the proposed statutory definition of “public benchmarking information.”

Second, Part EEE proposes to impose this new requirement on “covered property” defined as “any property that has one or more buildings that together exceed twenty-five thousand gross square feet in total combined floor area.” The bills should clarify that the term “property” applies to a single tax lot or multiple contiguous tax lots under common control.

#### **4. Enforcement Provisions**

New enforcement provisions in proposed §16-107 requires entities that sell or install products for which efficiency standards have been adopted to provide to the state any requested information regarding the entity’s “business practices, or business methods, or proposed business practices or methods.” This language is excessively broad, as the proposed enforcement provisions only apply to compliance with state or federal product efficiency standards. This information demand authority should be limited to information regarding such compliance.

Also, proposed amendments to §16-606 regarding the authority of the secretary of state’s imposition of civil penalties would direct any penalties collected under this provision to be deposited into the consumer protection account established under §97-www of the State Finance Law. Under current state law, funds in that account are exclusively available to the department of state for consumer protection related activities. We have long argued against having civil penalty revenues dedicated to the support of the enforcement agency’s budget, as it could provide an improper influence on determination of proper penalties. Penalty calculation should be based on the severity of a

violation and its impact, not the need for agency funding. Penalty income should go to the state General Fund.

We recognize that there will be many components to the state's greenhouse gas emission reduction and energy efficiency efforts. Proposed Part EEE is a complex, fair reaching proposal that addresses several elements of those efforts and raises significant public policy issues. We will continue to elicit feedback from New York's business community on this and related proposals and share that input with both the Administration and the legislature.

We urge the Administration and legislature to include address these concerns and recommendations in acting on proposed Part EEE, and we welcome the opportunity to discuss these comments and recommendations.