

FEDERAL TRADE COMMISSION**16 CFR Part 259****Guide Concerning Fuel Economy Advertising of New Automobiles****AGENCY:** Federal Trade Commission.**ACTION:** Final Amendment of the Guide.

SUMMARY: The Federal Trade Commission (FTC) is amending the "Guide Concerning Fuel Economy Advertising for New Automobiles" to conform to the Environmental Protection Agency's (EPA) rule regarding fuel economy labeling of new automobiles. In particular, the amendments are intended to conform the Guide to those portions of EPA's rule that now require disclosure of certain fuel economy information, including adjusted city and adjusted highway miles-per-gallon (mpg) numbers, rather than the one "estimated mpg" number previously required.

EFFECTIVE DATE: December 8, 1995.**FOR FURTHER INFORMATION CONTACT:**

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SUPPLEMENTARY INFORMATION:**I. Background**

The FTC's "Guide Concerning Fuel Economy Advertising for New Automobiles" was first promulgated in 1975.¹ The Guide was issued in response to a dramatic increase in advertising fuel economy claims based on a proliferation of different test procedures. The record of that proceeding showed both the importance of fuel economy to consumers in their automobile purchasing decisions and the need for meaningful fuel economy information based on a standard testing procedure. The original Guide adopted in 1975 by the Commission stated that fuel economy representations in advertising should be accompanied by disclosure of estimated city and highway mpg figures based on EPA test procedures.

In 1978 the FTC Guide was amended to make advertising disclosures consistent with changed EPA requirements for fuel economy labels on new automobiles.² At that time, the EPA mandated disclosure of a single number, designated "estimated mpg," and the FTC Guide was amended to require that fuel economy advertising

representations be accompanied by disclosure of this figure.

Subsequently, in 1984, the EPA again amended its rule to require that adjusted city and highway mpg estimates, as well as certain other fuel economy information, appear on labels for new automobiles. By Federal Register notice of March 21, 1985 (50 FR 11378) (comment period reopened November 7, 1985, 50 FR 46300), the FTC proposed amendments to conform its Guide to the revised EPA rule. In publishing its request for comments, the Commission stated that because the revised EPA rule was already in effect, automobile manufacturers and dealers could make fuel economy claims consistent with the proposal pending final amendment of the Guide. Thus, the proposal has been in effect informally since its date of original publication. The Commission now takes the final step of formally adopting the changes to its advertising Guide.

II. Public Comments

In the preamble to the 1985 Federal Register notice, the FTC discussed the history of the Guide and the changes in the EPA fuel economy labeling rule which led to the proposed changes in the advertising Guide. The preamble also described the changes to the Guide that the FTC proposed to make based on the changes to the EPA rule and the FTC's own experience with the advertising Guide. Additionally, in the preamble, the FTC requested comments regarding the cost of providing the information, the effect the Guide has on fuel economy advertising, and the utility of the information to consumers.

Comments were received from: the American Automobile Association; CBS, Inc.; the Center for Auto Safety; Dancer Fitzgerald Sample; the Department of Energy; the Environmental Protection Agency; General Motors Corporation; the Leo Burnett Advertising Agency; the National Association of Broadcasters; and the National Automobile Dealers Association. Three comments were also received from individuals: Arthur and Louise Britton; Ralph Williams; and Walt and Cathy Zimmerman.

A. General Comments

Some comments received from the automobile industry, the broadcasting industry, and one advertising agency either opposed retention of fuel economy disclosure requirements, or proposed that the disclosure requirements be limited to specific circumstances, such as advertisements making quantitative or comparative fuel economy claims. The comments opposing retention contended that the

requirements are burdensome, costly, and do not provide useful information to consumers. On the other hand, comments from individuals, public interest groups, the Department of Energy, EPA, and another advertising agency generally favored retention of the disclosure requirements. These comments contended that disclosure of the EPA mpg figures provides consumers with useful comparative fuel economy information, while adding little to advertising costs. One comment contended that elimination of these requirements would precipitate a variety of confusing fuel economy claims.

The FTC continues to believe that disclosure of EPA mpg numbers provides to consumers useful and understandable comparative fuel economy information. (See 40 FR 42003, September 10, 1975.) While there is undoubtedly a cost to providing this information, the FTC believes that the cost is relatively small³ and is more than offset by the value of the information, which enables consumers to judge the relative fuel economy of comparative automobile models. Moreover, the 1985 proposed amendments to the Guide substantially shortened the disclosures that must accompany advertised EPA estimates, thereby reducing costs. Furthermore, as discussed below, the FTC is allowing certain fuel economy advertisements to disclose only one EPA estimate—either the highway estimate or the city estimate—without simultaneous disclosure of the other number. Thus, advertisers now have both a shorter disclosure requirement and more flexibility when advertising fuel economy of new automobiles than was the case under the previously existing Guide.

B. EPA Estimates

Some commenters contended that both the city and highway estimates should be disclosed in all fuel economy advertisements in order to maintain consistency with the EPA labeling rule. Other comments suggested that disclosure of the EPA estimate should be required only when explicit mileage claims are made.

The FTC has determined to adhere to the 1985 proposal, requiring disclosure of the EPA number corresponding to the claim that is made. For example, if only a highway mileage claim is made in the

³ General Motors was the only commenting party to submit specific cost data. Its figures were disputed by the Center for Auto Safety. Dancer Fitzgerald Sample, an advertising agency, stated that it believed the cost of providing EPA estimates in fuel economy advertising to be minimal.

¹ 40 FR 42003 (September 10, 1975).

² 43 FR 55757 (November 29, 1978).

ad, then only the EPA highway estimate must be disclosed. If a general (i.e., nonspecific) mileage claim is made, only the city estimate must be disclosed. However, if the advertising claim addresses both city and highway driving, then both figures must be disclosed.

The FTC is adopting these disclosure requirements because the current EPA city and highway numbers more accurately predict actual in-use mileage. As a result, the FTC believes that disclosure of the city estimate may not be necessary in advertisements directed *only* to highway driving. Of course, advertisers are always free to disclose both city and highway numbers in their advertising.

Based on the reliability of the EPA city and highway numbers, the FTC's 1985 proposal did not include the lengthy disclosure, required under the previous Guide, warning that the consumer's actual mileage probably will be less and will depend upon factors such as weather conditions and driving speed.

The FTC, however, continues to believe that it is important that the EPA estimate accompany implicit as well as explicit mileage claims. Any mileage claim inherently involves a comparison to other vehicles. The EPA estimates provide consumers with a meaningful method of comparing competing claims.

The 1985 proposal, which has been in effect informally during the intervening years, is now time-tested. It appears that the proposal has worked well, and the Commission has not seen evidence of deceptive or misleading claims because of the changed disclosures. Therefore, formal adoption of the proposed Guide is warranted.

C. Non-EPA Test Results

The greatest number of comments addressed use of non-EPA test results. The comments ranged from advocating a prohibition on the use of such test results to espousing elimination of all disclosure of EPA estimates in ads using non-EPA results. Some comments also objected to the specific proposal that would allow the EPA estimates to be disclosed in "equal prominence" to the non-EPA results, in the audio portion of broadcast ads, instead of requiring "greater prominence" than the non-EPA results.

The FTC believes that if a non-EPA test is advertised, the appropriate EPA estimate should be disclosed with greater prominence, except in audio portions of advertisements. In the prior version of the Guide, the requirement had been that the EPA estimate had to be given before and after the non-EPA

estimate in audio broadcast ads. As a result, advertisers had less flexibility in developing broadcast ads than they did print ads. Unlike a printed disclosure, which may not be seen among other textual material unless it is more prominently displayed, however, an audio disclosure of the EPA estimate will be as likely to be heard as the non-EPA estimate. Accordingly, the FTC believes that adopting an "equal prominence" provision for audio portions of advertisements will reasonably ensure that the EPA estimates are conveyed to the listener without unduly burdening the advertiser.

List of Subjects in 16 CFR Part 259

Advertising, Fuel economy, Trade practices.

For the reasons set forth in the preamble, 16 CFR Part 259 is amended to read as follows:

PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

Sec.

259.1 Definitions.

259.2 Advertising disclosures.

Authority: 15 U.S.C. 41–58.

§ 259.1 Definitions.

For the purposes of this part, the following definitions shall apply:

(a) *New automobile*. Any passenger automobile or light truck for which a fuel economy label is required under the Energy Policy and Conservation Act (42 U.S.C. 6201 *et seq.*) or rules promulgated thereunder, the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser. The term "manufacturer" shall mean any person engaged in the manufacturing or assembling of new automobiles, including any person importing new automobiles for resale and any person who acts for and is under control of such manufacturer, assembler, or importer in connection with the distribution of new automobiles. The term "dealer" shall mean any person, resident or located in the United States or any territory thereof, engaged in the sale or distribution of new automobiles to the ultimate purchaser. The term "ultimate purchaser" means, for purposes of this part, the first person, other than a dealer purchasing in his or her capacity as a dealer, who in good faith purchases such new automobile for purposes other than resale, including a person who leases such vehicle for his or her personal use.

(b) *Estimated city mpg*. The gasoline consumption or mileage of new automobiles as determined in accordance with the city test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR 600.209–85 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, published, or accepted by the U.S. Environmental Protection Agency.

(c) *Estimated highway mpg*. The gasoline consumption or mileage of new automobiles as determined in accordance with the highway test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR 600.209–85 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, published, or accepted by the U.S. Environmental Protection Agency.

(d) *Vehicle configuration*. The unique combination of automobile features, as defined in 40 CFR 600.002–85(24).

(e) *Estimated in-use fuel economy range*. The estimated range of city and highway fuel economy of the particular new automobile on which the label is affixed, as determined in accordance with procedures employed by the U.S. Environmental Protection Agency as described in 40 CFR 600.311 (for the appropriate model year), and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported or accepted by the U.S. Environment Protection Agency.

(f) *Range of estimated fuel economy values for the class of new automobiles*. The estimated city and highway fuel economy values of the class of automobile (e.g., compact) as determined by the U.S. Environmental Protection Agency pursuant to 40 CFR 600.315 (for the appropriate model year) and expressed in miles-per-gallon, to the nearest whole mile-per-gallon.

§ 259.2 Advertising disclosures.

(a) No manufacturer or dealer shall make any express or implied representation in advertising concerning the fuel economy of any new automobile¹ unless such representation is accompanied by the following clear and conspicuous disclosures:

- (1) If the advertisement makes:
(i) Both a city and a highway fuel economy representation, both the

¹ The Commission will regard as an express or implied fuel economy representation one which a reasonable consumer, upon considering the representation in the context of the entire advertisement, would understand as referring to the fuel economy performance of the vehicle or vehicles advertised.

"estimated city mpg" and the "estimated highway mpg" of such new automobile,² must be disclosed;

(ii) A representation regarding only city or only highway fuel economy, only the corresponding EPA estimate must be disclosed;³

(iii) A general fuel economy claim without reference to either city or highway, or if the representation refers to any combined fuel economy number, the "estimated city mpg" must be disclosed;⁴ and

(2) That the U.S. Environmental Protection Agency is the source of the "estimated city mpg" and "estimated highway mpg" and that the numbers are estimates.⁵

(b) If an advertisement for a new automobile cites:

(1) The "estimated in-use fuel economy range," the advertisement must state with equal prominence both the upper and lower number of the range, an explanation of the meaning of the numbers (*i.e.*, city mpg range or highway mpg range or both), and that the U.S. Environmental Protection Agency is the source of the figures.

(2) The "range of estimated fuel economy values for the class of new automobiles" as a basis for comparing the fuel economy of two or more automobiles, such comparison must be made to the same type of range (*i.e.*, city or highway).⁶

(c) Fuel economy estimates derived from a non-EPA test may be disclosed provided that:

²For purposes of § 259.2(a), the "estimated city mpg" and the "estimated highway mpg" must be those applicable to the specific nameplate being advertised. Fuel economy estimates assigned to "unique nameplates" (see 40 CFR 600.207-86(a)(2)) apply only to such unique car lines. For example, if a manufacturer has a model named the "XZA" that has fuel economy estimates assigned to it and a derivative model named the "Econo-XZA" that has separate, higher fuel economy estimates assigned to it, these higher numbers assigned to the "Econo-XZA" cannot be used in advertisements for the "XZA."

³For example, if the representation clearly refers only to highway fuel economy, only the "estimated highway mpg" need be disclosed.

⁴Nothing in this section should be construed as prohibiting disclosure of both the city and highway estimates.

⁵The Commission will regard the following as the minimum disclosure necessary to comply with § 259.2(a)(2), regardless of the media in which the advertisement appears: "EPA estimate(s)."

For television, if the estimated mpg appears in the video, the disclosure must appear in the video; if the estimated mpg is audio, the disclosure must be audio.

⁶For example, an advertisement could not state that "according to EPA estimates new automobiles in this class get as little as X mpg (citing a figure from the city range) while EPA estimates that this automobile gets X + mpg (citing the EPA highway estimates or a number from the EPA estimated in-use fuel economy highway range for the automobile).

(1) The advertisement also discloses the "estimated city mpg" and/or the "estimated highway mpg," as required by § 259.2(a), and the disclosure required by § 259.2(a), and gives the "estimated city mpg" and/or the "estimated highway mpg" figure(s) substantially more prominence than any other estimate;⁷ provided, however, for radio and television advertisements in which any other estimate is used only in the audio, equal prominence must be given the "estimated city mpg" and/or the "estimated highway mpg" figure(s);⁸

(2) The source of the non-EPA test is clearly and conspicuously identified;

(3) The driving conditions and variables simulated by the test which differ from those used to measure the "estimated city mpg" and/or the "estimated highway mpg," and which result in a change in fuel economy, are clearly and conspicuously disclosed.⁹ Such conditions and variables may include, but are not limited to, road or dynamometer test, average speed, range

⁷The Commission will regard the following as constituting "substantially more prominence:"

For television only: If the estimated city and/or highway mpg and any other mileage estimate(s) appear only in the visual portion, the estimated city and/or highway mpg must appear in numbers twice as large as those used for any other estimate, and must remain on the screen at least as long as any other estimate. If the estimated city and highway mpg appear in the audio portion, visual broadcast of any other estimate must be accompanied by the simultaneous, at least equally prominent, visual broadcast of the estimated city and/or highway mpg. Each visual estimated city and highway mpg must be broadcast against a solid color background that contrasts easily with the color used for the numbers when viewed on both color and black and white television.

For print only: The estimated city and/or highway mpg must appear in clearly legible type at least twice as large as that used for any other estimate. Alternatively, if the estimated city and highway mpg appear in type of the same size as such other estimate, they must be clearly legible and conspicuously circled. The estimated city and highway mpg must appear against a solid color, contrasting background. They may not appear in a footnote unless all references to fuel economy appear in a footnote.

⁸The Commission will regard the following as constituting equal prominence. For radio and television when any other estimate is used in the audio: The estimated city and/or highway mpg must be stated, either before or after each disclosure of such other estimate at least as audibly as such other estimate.

⁹For dynamometer tests any difference between the EPA and non-EPA tests must be disclosed. For in-use tests, the Commission realizes that it is impossible to duplicate the EPA test conditions, and that in-use tests may be designed to simulate a particular driving situation. It must be clear from the context of the advertisement what driving situation is being simulated (*e.g.*, cold weather driving, highway driving, heavy load conditions). Furthermore, any driving or vehicle condition must be disclosed if it is significantly different from that which an appreciable number of consumers (whose driving condition is being simulated) would expect to encounter.

of speed, hot or cold start, and temperature; and

(4) The advertisement clearly and conspicuously discloses any distinctions in "vehicle configuration" and other equipment affecting mileage performance (*e.g.*, design or equipment differences which distinguish subconfigurations as defined by EPA) between the automobiles tested in the non-EPA test and the EPA tests.

By direction of the Commission.
Donald S. Clark,
Secretary.

Concurring Statement of Commissioner
Mary L. Azcuenaga, New Automobile
Mileage Guide, Matter No. P844508

Today, the Commission issues amendments to the Fuel Economy Advertising Guide. I join the Commission in issuing the amended Guide because the amendments are needed to conform the Guide to the Environmental Protection Agency's rules concerning fuel economy and because the amendments otherwise appear to be improvements. The Commission proposed these amendments to the Guide and received comments on them in 1985. Given that the record on which the amendments are based closed a decade ago, I would have preferred, before finalizing the amendments, to reopen the comment period for thirty days to ascertain whether the amendments should be issued as is or should be revised to reflect any new information.¹

When the proposed amendments were published for comment, the Commission stated that it would not consider advertising that complied with the amendments to violate Section 5 of the FTC Act. It is my understanding that most fuel economy advertising since 1985 has been consistent with the proposed amendments to the Guide. It is also my understanding that fuel economy advertising has become less prevalent since 1985. The decrease in fuel economy advertising may be due to changes in the relative importance that consumers attach to fuel economy information when making a new automobile purchase. In the alternative, fuel economy advertising may have become less prevalent because the standards contained in the amended Guide are overly regulatory and have deterred truthful as well as deceptive advertising. The record supporting the amendments, having closed a decade ago, sheds no light on why fuel economy advertising has decreased during the ensuing years. Given the potential value of truthful fuel economy advertising, it would have been worthwhile to seek public comment again before issuing the amended Guide to ensure that it not only helps to prevent deception but also does not deter truthful advertising.

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¹Reopening the comment period would have been consistent with the Commission's ongoing regulatory review program under which its rules and guides are reviewed at least once every ten years.