

# Proposed Rules

Federal Register

Vol. 74, No. 80

Tuesday, April 28, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 193

[Docket No. FAA-2009-0245]

#### Voluntary Disclosure Reporting Program; National Wildlife Aircraft Hazard Database

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of determination not to proceed with proposed order designating information as protected from disclosure.

**SUMMARY:** The FAA proposed that bird strike information voluntarily reported to the Agency and entered into the FAA's National Wildlife Aircraft Hazard Database be designated by an FAA order as protected from public disclosure in accordance with the provisions of 14 CFR part 193. After further review and consideration, the FAA has determined not to proceed with an order designating the wildlife database as protected under part 193.

**FOR FURTHER INFORMATION CONTACT:** John Weller, Airport Safety and Operations Division, AAS-300, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591, telephone (202) 267-3778.

#### SUPPLEMENTARY INFORMATION:

##### Availability of This Notice

You can get an electronic copy of this notice using the Internet by:

- (1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>);
- (2) Visiting the FAA's Regulations and Policies Web page at <http://www.faa.gov/regulations-policies/>; or
- (3) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>.

#### Background

Under 49 U.S.C. 40123, certain voluntarily provided safety and security

information is protected from disclosure to encourage persons to provide the information to the FAA. The FAA must issue an order to make certain findings before the information is protected from disclosure. The FAA's rules implementing that section are in 14 CFR part 193. If the Administrator issues an order designating information as protected under 49 U.S.C. 40123, that information will not be disclosed under the Freedom of Information Act (5 U.S.C. 552) or other laws except as provided in 49 U.S.C. 40123 and 14 CFR part 193.

On March 19, 2009, the FAA published a proposed order that, if adopted, would have designated certain information in the FAA's wildlife database as information protected under part 193. This proposed order was issued under 14 CFR 193.111, which sets out the notice procedure for designating information as protected. The FAA invited interested persons to participate in this proposal by submitting written comments, data, or views. We also invited comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The comment period concluded on April 20, 2009. The FAA received 47 comments, the majority of which were not in favor of protecting the database.

After further review and consideration, the FAA has determined not to proceed with an order designating information in the National Wildlife Aircraft Strike database as protected under part 193 at this time. The FAA will modify the public Wildlife Aircraft Strike Web site to make the database available to all users consistent with the Freedom of Information Act (FOIA) and Agency policy.

Issued in Washington, DC, on April 22, 2009.

**Catherine M. Lang,**

*Acting Associate Administrator for Airports.*

[FR Doc. E9-9638 Filed 4-24-09; 8:45 am]

**BILLING CODE P**

## FEDERAL TRADE COMMISSION

### 16 CFR Part 259

#### Guide Concerning Fuel Economy Advertising for New Automobiles

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Trade Commission ("FTC" or "Commission") is seeking comments on proposed amendments to the FTC's Guide Concerning Fuel Economy Advertising for New Automobiles ("Fuel Economy Guide" or "Guide"). The amendments would amend the Guide to reflect changes to the Environmental Protection Agency's ("EPA") fuel economy labeling rules for new automobiles and to take into account developments in automobile technology.

**DATES:** Written comments must be received by June 26, 2009.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Fuel Economy Guide Review, Matter No. R711008" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Website, at (<http://www.ftc.gov/os/publiccomments.shtml>).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . ." as provided in Section 6(f) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled

“Confidential,” and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>1</sup>

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (<https://secure.commentworks.com/ftc-fueleconomyguide>) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (<https://secure.commentworks.com/ftc-fueleconomyguide>). If this Notice appears at (<http://www.regulations.gov/search/index.jsp>), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the “Fuel Economy Guide Review, Matter No. R711008” reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex F), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.shtml>). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC

<sup>1</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtml>).

**FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, (202) 326-2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, DC 20001.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Commission adopted the Fuel Economy Guide in 1975 to prevent deceptive fuel economy advertising and to facilitate the use of fuel economy information in advertising. The Guide helps advertisers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act (15 U.S.C. 45(a)).<sup>2</sup> To accomplish this goal, the Guide contains specific information about the disclosure of mileage information generated by EPA's well-established fuel economy program. Under EPA regulations (40 CFR Part 600), vehicle manufacturers must disclose fuel economy numbers on labels attached to new automobiles.<sup>3</sup> In addition, EPA regulations contain specific testing protocols (see 40 CFR Part 86) that manufacturers must use to derive the fuel economy information used on labels.

To avoid deceptive or unfair claims in advertisements that contain fuel economy representations, the Fuel Economy Guide advises marketers to disclose established fuel economy estimates (e.g., miles per gallon or “mpg”) as determined by the mandatory EPA testing protocols (“EPA tests”). If advertisers make fuel economy claims based on non-EPA tests, the Guide directs them to disclose EPA-derived fuel economy information and provide details about the non-EPA tests such as the source of the test, driving conditions, and vehicle configurations.

In 1978 and again in 1995, the Commission amended the Guide to make it consistent with changes to

<sup>2</sup> The Commission's industry guides, such as the Fuel Economy Guide, are administrative interpretations of the application of Section 5 of the FTC Act, 15 U.S.C. 45(a). The Commission issues industry guides to provide guidance for the public to conform with legal requirements. These guides provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. 16 CFR Part 17. Failure to follow industry guides may result in corrective action under Section 5 of the FTC Act. In any such enforcement action, the Commission must prove that the act or practice at issue is unfair or deceptive.

<sup>3</sup> EPA issued its fuel economy labeling regulations pursuant to the Energy Policy and Conservation Act of 1975 (49 U.S.C. 32901).

EPA's regulations. (43 FR 55757 (Nov. 29, 1978); and 60 FR 56230 (Nov. 8, 1995)). On December 27, 2006 (71 FR 77872), the EPA published new requirements for fuel economy labeling. The revised EPA rules include modifications to the mandatory fuel economy test that, among other things, incorporate different driving conditions (e.g., cold temperatures) into the determination of fuel mileage estimates. The recent EPA amendments also modify the design of the fuel economy label and require disclosure of fuel combined (i.e., city and highway) fuel economy figures in addition to separate city and highway ratings.

Following EPA's amendments, the Commission published a **Federal Register** notice on May 9, 2007 (72 FR 26328) seeking comment on the overall costs, benefits, necessity, and regulatory and economic impact of the Guide. The Notice also sought comment on whether the Guide should be amended in light of EPA's recent rule changes. The Commission has reviewed the comments received, and now is seeking comment on proposed amendments to the Guide. This Notice contains an analysis of the comments received and a description of the proposed amendments (section II), an invitation for comment on those amendments (section III), and the proposed language for the amendments (section IV).

**II. Analysis of Comments**

The Commission received four comments in response to its May 9, 2007 notice.<sup>4</sup> The comments raised a variety of issues about the current Guide. Those comments, along with the Commission's responses, are detailed as follows:

*A. Benefits of and Need for the Guide*

*Issue and Comments:* In the May 9, 2007 **Federal Register** notice, the Commission asked whether there is a continuing need for the Fuel Economy Guide and whether the Guide is necessary to prevent unfair or deceptive practices. In response, the comments indicated that the Guide provides significant benefits to consumers. According to the Alliance of Automobile Manufacturers (“Alliance”), the Guide “is an important industry standard” that has resulted in informative disclosures to consumers that are not overly burdensome to

<sup>4</sup> Alliance of Automobile Manufacturers (#529732-00005); Association of International Automobile Manufacturers, Inc. (#529732-00008); Broward County Consumer Affairs (#529732-00001) (#529732-00002) (#529732-00003) (#529732-00004); and National Automobile Dealers Association (#529732-00007).

manufacturers. The Association of International Automobile Manufacturers, Inc. (“AIAM”) described the Guide as “an important industry and consumer resource.” Similarly, the National Automobile Dealers Association (“NADA”) wrote that the Guide “serves to assure prospective new vehicle purchasers that fuel economy claims consistently will be advertised in an understandable manner.” In NADA’s view, the Guide also helps “ensure that prospective purchasers receive objective, uniform information, and that manufacturers and dealers fairly and even-handedly advertise the fuel economy of the new vehicles they sell.”

The Broward County Consumer Affairs Division (“Broward County”), a local consumer protection agency in Florida, also supported continued publication of the Guide. In its view, manufacturers and dealers would engage in unfair or deceptive trade practices routinely if the Guide did not exist. Broward County uses the Guide to review fuel economy advertisements and to bring enforcement actions in its role as a watchdog over the advertising and sale of new vehicles. Without the Guide, Broward County believes “consumers would be at a significant disadvantage when buying a new car.” Broward County also noted that the Guide yields benefits for both consumers and industry by encouraging consistency in fuel economy advertising, which provides “stability and equality for the consumer when purchasing a new car.” In addition, Broward County indicated that, in its view, “auto dealers and manufacturers find it easier, more cost effective and less labor intensive to use the pre-determined EPA estimates.”

While all the comments generally supported the Guide, several noted the need to update specific provisions. For example, both Alliance and AIAM urged the Commission to amend the Guide to ensure consistency with EPA regulations and reflect changes in vehicle technology and fuel use. AIAM noted, however, that despite the need for conforming changes, there is no need to alter the basic information in the Guide.

*Discussion:* The Commission plans to retain the Guide. The comments received suggest that the Fuel Economy Guide is useful to both consumers and the new vehicle industry. The Guide encourages clarity in advertising fuel economy and helps combat unfair or deceptive practices. While these benefits are difficult to quantify, the comments suggest that they are significant. At the same time, the comments indicate that any burdens

associated with the Guide are minimal. Therefore, it appears that there is a continuing need for the Fuel Economy Guide and that its benefits outweigh any costs it may entail. In addition, we expect that the Guide’s benefits will continue into the future. Whether due to high gasoline prices or consumer interest in minimizing energy use for environmental reasons, we expect advertisers will continue to use fuel economy as a way to distinguish their vehicles.

In addition to retaining the Guide, we are also proposing several amendments in response to EPA rule changes and other developments related to fuel economy advertising. The emergence of new automobile technology, such as electric hybrid vehicles, underscores the importance of ensuring that the Guide is applicable to a changing market. The proposed amendments, as discussed in detail below, should help ensure the Guide keeps pace with these various changes.

#### *B. Definitions—Section 259.1*

*Issues, Comments, and Discussion:* Several commenters recommended changes to the Guide’s definitions and citations in light of recent changes to EPA requirements. These various terms and issues are addressed as follows:

*New Automobile:* The current Guide defines “new automobile” as “[a]ny 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 Alliance, NADA, AIAM, and Broward County all noted that EPA will require a fuel economy label for medium duty passenger vehicles manufactured during the 2011 model year or thereafter. Accordingly, they suggested that the Commission amend the Guide’s definition of “new automobile” to reflect this upcoming change.

In response to these comments, the Commission proposes to amend the definition of “new automobile” to include the term “medium duty passenger vehicle.” The amended definition, however, would only apply to vehicles “for which a fuel economy label is required.” Accordingly, the Guide would not cover medium duty passenger vehicles until EPA regulations require labeling for such vehicles in 2011.

*Statutory and Regulatory Citations:* Both AIAM and the Alliance recommended that the Commission

update the Guide’s citation to the Energy Policy and Conservation Act to 49 U.S.C. 32901. The Alliance also suggested changes to the Guide’s citations to EPA regulations to reflect the new amendments. To remain current in the future, NADA recommended that the Commission replace specific cites in the Fuel Economy Guide with more general references to EPA regulations such as 40 CFR Part 600.

Based on these comments, the Commission proposes to update the citation to EPCA (*i.e.*, 49 U.S.C. 32901). In addition, we propose to replace specific regulatory citations with a general reference to EPA regulations at 40 CFR Part 600. This will reduce the need to amend the Guide in the future while still providing a useful reference to EPA regulations.

*Fuel Economy:* The current Guide uses terms such as “mpg” (miles-per-gallon), “consumption,” and “mileage” as fuel efficiency descriptors for vehicles. The Alliance, NADA, and AIAM suggested the Commission use the term “fuel economy” when referring to a vehicle’s fuel efficiency, instead of these other terms because “fuel economy” is the “standard industry term . . . and is readily understood by the public.” We agree that the Guide should use the standard industry terms. Therefore, we propose to amend the Guide to use the term “fuel economy” when describing a vehicle’s fuel efficiency. Accordingly, the proposed amendments use that term in lieu of other descriptors.

*Estimated Highway, City, and Combined Fuel Economy:* The current Guide provides information on estimated highway and city fuel economy but does not provide guidance on combined fuel economy. Both NADA and Broward County suggested that the FTC amend the Fuel Economy Guide to address claims for combined fuel economy because such information is now required on the EPA label. In particular, NADA recommended that the FTC adopt EPA’s definition of that term.<sup>5</sup> We agree with the comments that the Guide should include references to “combined fuel economy.” Because manufacturers must disclose such information on EPA’s fuel economy label, the Guide should also include the

<sup>5</sup> EPA regulations (40 CFR 600.002-08) define “combined fuel economy” as “(1) the fuel economy value determined for a vehicle (or vehicles) by harmonically averaging the city and highway fuel economy values, weighted 0.55 and 0.45 respectively, (2) for electric vehicles, the term means the equivalent petroleum-based fuel economy value as determined by the calculation procedure promulgated by the Secretary of Energy.”

term in addressing fuel economy advertising claims. This will ensure that the scope of the Guide is consistent with the scope of fuel economy representations required on the EPA label.

**Range Claims:** In addressing fuel economy range claims, the Guide uses the terms “expected range of fuel economy” and “range of estimated fuel economy values for the class of new automobiles.” This provision is meant to apply to any claims related to a fuel economy range and not just claims containing these specific terms. To clarify this intent, we propose to add the phrase “or similar language” following the appearance of the terms “expected range of fuel economy” and “range of estimated fuel economy values for the class of new automobiles.”<sup>6</sup>

**Other Minor Changes:** We also propose to make the following four, minor changes to the Guide:

**MPG.** We propose amending the Guide’s definitions for city and highway fuel economy estimates so that they are consistent with the terms and definitions used by EPA. For example, we propose to change the term “estimated city mpg” to “estimated city fuel economy,” the term used by EPA in its regulations.<sup>7</sup>

**In-Use.** We propose eliminating the words “in-use” from the term for fuel economy range because “in-use” is not generally used by EPA and also may imply that data is generated from actual driving conditions and not the laboratory tests required by EPA regulations.<sup>8</sup>

<sup>6</sup> Broward County recommended that the definition of “estimated in-use fuel economy range” at Section 259.1(e) include the EPA-required phrase “Expected range for most drivers [ ] to [ ] MPG.” See 40 CFR 600.307-08(b)(5). We expect that the insertion of the phrase “or similar language” will address that concern.

<sup>7</sup> The proposed definitions for these two terms read: “*Estimated city fuel economy.* The city fuel economy determined in accordance with the city test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR Part 600 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”; and “*Estimated highway fuel economy.* The highway fuel economy determined in accordance with the highway test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR Part 600 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.”

<sup>8</sup> The proposed definition reads: “*Range of fuel economy.* The range of city, highway, or combined 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 Part 600 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured,

*Unique Nameplate.* We propose eliminating an obsolete reference to the term “unique nameplate” in footnote 2 of the Guide and replacing it with the more appropriate EPA term “model type.”<sup>9</sup>

*New Automobile.* Embedded within the definition of “new automobile” in the current Guide are other definitions for the terms “dealer,” “manufacturer,” and “ultimate purchaser.” We propose to amend this provision by creating separate definitions for these latter three terms.

#### C. Non-EPA Estimates—Section 259.2(c)

**Issue and Comments:** Section 259.2(c) of the Guide addresses fuel economy claims derived from non-EPA tests. The Guide indicates that advertisers can make fuel economy claims based on non-EPA information as long as they: 1) disclose the corresponding EPA estimates with more prominence than other estimates, 2) identify the source of the non-EPA information, and 3) disclose how their non-EPA test differs from the EPA test in terms of driving conditions and other relevant variables.

NADA suggested that the Commission delete Section 259.2(c) because the “benefit of being able to advertise non-EPA fuel economy estimates is outweighed by the need for uniformity, clarity, and fairness.” In its view, the FTC should retain this section only if there is evidence that sellers regularly advertise “non-EPA fuel economy estimates, and are expected to conduct similar advertising in the future.” Broward County did not suggest that FTC eliminate this section but recommended changes in light of EPA’s recent amendments. In particular, it recommended the addition of more examples in Section 259.2(c)(3) of the test conditions and variables that may differ from those covered by the EPA test, such as high speed/rapid acceleration driving, use of air conditioning, cold temperature operation, road grade, wind, tire pressure, load, and the effects of different fuel properties.

**Discussion:** The Commission proposes retaining the Guide’s current provision

reported, or accepted by the U.S. Environment Protection Agency.”

<sup>9</sup> The relevant portion of the proposed footnote language reads: “Fuel economy estimates assigned to model types (see 40 CFR 600.208-08(a)(2)), should not be used for other vehicles in a car line that have different fuel economy ratings. 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.’”

related to non-EPA fuel economy claims. We have identified no basis to prohibit fuel economy advertising claims based on non-EPA tests. We recognize that many interested parties favor disclosure of EPA data because it creates a level playing field for industry members and provides familiar, standardized information for consumers. In addition, claims based on the non-EPA data have the potential to mislead consumers if the basis for such claims are not adequately disclosed. We have no evidence, however, to conclude that such claims are deceptive in all contexts. Accordingly, the proposed amended Guide retains the section related to non-EPA tests.

We are not proposing to expand the list of examples related to test conditions and variables that advertisers may need to disclose when making fuel economy claims based on non-EPA testing, as suggested by Broward County. The current Guide is clear that the existing five examples are not exhaustive. Absent clear evidence of problems with particular test discrepancies (e.g., tire pressure, road grade), there appears to be little benefit in adding additional examples to the list.<sup>10</sup>

#### D. Alternative Fueled Vehicles

**Issue and Comments:** When addressing fuel economy estimates, the current Guide refers to “gasoline consumption or mileage of new automobiles” (emphasis added). It does not mention other fuel types such as diesel, electricity, and ethanol. The comments questioned whether the Guide is unnecessarily limited to advertisements involving gasoline. The Alliance argued that such a limitation is inappropriate because many vehicles also run on alternative fuels. NADA explained that manufacturers are producing new vehicle types such as hybrids designed to run on electricity, liquid fuel, or a combination of the two; dedicated alternative fuel vehicles; and dual or flex-fuel vehicles. NADA recommended that the Guide require disclosure of: 1) all fuels used by new vehicles; 2) the fuels actually used to

<sup>10</sup> Footnotes 7 and 8 in the current Guide provide guidance regarding the relative size and prominence of fuel economy claims based on non-EPA and EPA estimates in television, radio, and print advertisements. We propose to add language clarifying that these footnotes provide examples and do not dictate the only approach in every context. We recognize that there may be other ways to ensure that the EPA estimates receive “more prominence than any other estimate” beyond those detailed in these footnotes. The proposed language also clarifies that the guidance applies to any advertising medium, not only to television, radio, and print.

generate advertised EPA estimates; and 3) any appropriate information from the Commission's labeling requirements for alternative fuels and alternative fueled vehicles (16 CFR Part 309). For example, NADA suggested that advertisements for dual or flex-fuel vehicles indicate the estimated range for each type of fuel. NADA believes that such information would "enable consumers to better compare vehicles using the same fuel and/or technology and to better compare new technology and alternative fuel vehicles to their gasoline counterparts."

*Discussion:* The Commission proposes to amend the Guide in two respects related to alternative fuel vehicles. First, we propose to clarify that the Guide's provisions apply to all fuel types covered by EPA's current fuel economy labeling program. Second, we propose adding guidance related to advertising claims for the cruising range of vehicles run by alternative fuels such as electricity.

First, we agree with commenters that the FTC's guidance should cover claims related to newer vehicle types and a broader range of fuel categories to help advertisers avoid making deceptive claims in the changing automobile market. The amendments, therefore, would remove references to "gasoline" throughout the Guide (e.g., in the definitions for city and highway fuel economy) and replace them with references to the term "fuel." The proposed amendments would also add a definition for "fuel" to the Guide that specifically refers to fuels covered under EPA's current labeling requirements, namely gasoline, electricity, alcohol, and natural gas.<sup>11</sup>

Second, the Commission proposes to add guidance related to cruising range information for alternative fueled vehicles, as suggested by NADA. The FTC's Alternative Fueled Vehicle Rule (16 CFR Part 309) requires estimated cruising range disclosures on labels for alternative fuel vehicles such as those powered by electricity, natural gas, and hydrogen.<sup>12</sup> For most alternative fueled vehicle types, the Rule also identifies specific procedures manufacturers must use to calculate those cruising ranges (e.g., EPA- and FTC-mandated procedures for most vehicles).<sup>13</sup>

<sup>11</sup> See <http://www.fueleconomy.gov/> for a list of currently available alternative fueled vehicles.

<sup>12</sup> The FTC's labeling requirements apply to vehicles capable of operating on methanol (or other alcohols), ethanol at mixtures of 85 percent or more, natural gas, liquefied petroleum gas, hydrogen, coal-derived liquid fuels, fuels derived from biological materials, and electricity. See 16 CFR 309.1.

<sup>13</sup> For most vehicles, the FTC Rule requires the use of EPA fuel economy data to derive cruising ranges. For electric vehicles, however,

Cruising ranges provide consumers with important information about the number of miles vehicles will travel between refueling (e.g., the number of miles an electric vehicle will travel on a single charge).

Industry trends suggest that advertisements related to cruising range will increase over the next several years. Recently, manufacturers have increased their development and marketing of vehicles that use alternative fuels such as ethanol<sup>14</sup> and compressed natural gas. They are also developing a variety of vehicles that use technologies not previously available on a wide basis, such as plug-in electric vehicles ("PHEVs"), pure electric vehicles ("EVs"), and vehicles that use hydrogen fuel cell technology. Given these developments, advertising claims for cruising range are likely to become more prevalent.

Though we expect that most advertisers will use the FTC-required procedures to derive cruising range estimates, some may seek to use alternative estimates in advertising. Such claims, advertised without qualification, could harm consumers by confusing or deceiving those who assume the cruising range estimates appearing in advertisements are the same as those appearing on the FTC-required vehicle label. To avoid such problems, the proposed Guide amendments would indicate that advertisers making such claims should identify the estimate required on the FTC label, disclose the source of the non-FTC derived cruising range information, and describe any material differences between the FTC-mandated and non-FTC procedures.<sup>15</sup> Because the Commission already has established similar guidance for analogous claims related to fuel economy in Section 259.2(c), we have based this new proposed guidance for alternative fuel

manufacturers must determine cruising ranges using Society of Automotive Engineers ("SAE") Surface Vehicle Recommended Practice SAE J1634—1993—05—20, "Electric Vehicle Energy Consumption and Range Test Procedure." 16 CFR 309.22(a)(2). For non-electric vehicles that are not subject to EPA's fuel economy labeling regulations (40 CFR Part 600) (e.g., certain ethanol vehicles), the FTC's Alternative Fuel Vehicle Rule requires manufacturers to have competent and reliable evidence that substantiates the minimum and maximum number of miles the vehicle will travel between refueling and recharging. See 16 CFR 309.22.

<sup>14</sup> Although EPA's fuel economy labeling requirements currently do not apply to ethanol, EPA is considering the issue. See 71 FR at 77904-05.

<sup>15</sup> As part of these proposed changes related to alternative fueled vehicles, the amendments would also add definitions to Section 259.1 for "alternative fueled vehicle" and "estimated cruising range."

vehicle claims on those existing provisions.

We invite comments on this proposal. In particular, we seek information on whether cruising range estimates will become increasingly prevalent in the future and whether the proposed guidance is necessary to help prevent deceptive advertising.

#### E. Model Year

*Issue and Comments:* The current Fuel Economy Guide does not address a vehicle's model year. NADA suggested that fuel economy advertisements should specify the vehicle's model year because EPA's new fuel economy standards took effect in model year 2008. NADA believes that clear disclosure of model year is important to allow consumers to make appropriate comparisons between models labeled with the old test results and those labeled with the new results.

*Response:* The Commission is not proposing to change the Guide to address disclosures related to model year. We understand that the EPA test procedure amendments yielded fuel economy numbers for all 2008 vehicles that are substantially different from those for 2007 models. This inconsistency, however, reflected a temporary transition and we expect that any confusion has diminished as 2007 vehicles have been sold. Accordingly, any specific guidance on the use of model year information in advertisements in the Fuel Economy Guide would be obsolete.<sup>16</sup>

#### F. Consumer Education

*Issue and Comments:* Broward County urged the Commission to increase its consumer education efforts to ensure that consumers understand the impact of changes in EPA's test procedures.

*Discussion:* The Commission currently provides consumers with information related to fuel and fuel economy through its website at (<http://www.ftc.gov/energy>). These resources include information on gas mileage, questionable "gas-savings" products, alternative fueled vehicles, and octane ratings. We will consider adding additional consumer education materials as appropriate. As for information about the new fuel economy estimates, we note that EPA and DOE already maintain a website <http://www.fueleconomy.gov> that provides comprehensive consumer information on the fuel economy issues, including detailed information on the new fuel economy ratings and labels

<sup>16</sup> We note that nothing prohibits the inclusion of model year information in an advertisement.

(<http://www.fueleconomy.gov/feg/ratings2008.shtml>).

### III. Request for Comment and Regulatory Review Program

The Commission solicits written public comments on any aspect of the proposed amendments to the Fuel Economy Guide announced in this Notice. We specifically request comments on the following questions:

(1) What costs or burdens, or other impacts, would the proposed amendments impose, and on whom? What evidence supports the asserted costs, burdens, or other impacts?

(2) What modifications, if any, should the Commission make to the proposed amendments to increase their benefits to consumers?

(a) What evidence supports your proposed modifications? Please submit any such evidence.

(b) How would these modifications affect the costs and benefits of the proposed amendments for consumers?

(c) How would these modifications affect the costs and benefits of the proposed requirements for businesses, and in particular, small businesses?

(3) What modifications, if any, should the Commission make to the proposed amendments to decrease their burdens on businesses?

(a) What evidence supports your proposed modifications? Please submit any such evidence.

(b) How would these modifications affect the costs and benefits of the proposed requirements for consumers?

(c) How would these modifications affect the costs and benefits of the proposed requirements for businesses, and in particular, small businesses?

(4) Should the Guide include provisions related to cruising range claims for alternative fuel vehicles as proposed? Will cruising range estimates become increasingly prevalent in the future? Is the proposed guidance necessary to help prevent deceptive advertising related to such claims?

#### List of Subjects in 16 CFR Part 259

Advertising, Fuel economy, Trade practices.

For the reasons set forth in the preamble, the Commission proposes to amend 16 CFR Part 259 as follows:

#### PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

1. The authority citation for part 259 continues to read as follows:

**Authority:** 15 U.S.C. 41—58.

2. Section 259.1 is revised to read as follows:

#### § 259.1 Definitions.

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

(a) *Alternative fueled vehicle.* Any vehicle that qualifies as a covered vehicle under 16 CFR Part 309.

(b) *Dealer.* Any person located in the United States or any territory thereof engaged in the sale or distribution of new automobiles to the ultimate purchaser.

(c) *Estimated city fuel economy.* The city fuel economy determined in accordance with the city test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR Part 600 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) *Estimated combined fuel economy.* The combined fuel economy value determined for a vehicle (or vehicles) in accordance with U.S. Environmental Protection Agency regulations described in 40 CFR Part 600 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.

(e) *Estimated cruising range.* An estimate of the number of miles an alternative fueled vehicle will travel between refueling as defined and determined pursuant to 16 CFR Part 309.

(f) *Estimated highway fuel economy.* The highway fuel economy determined in accordance with the highway test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR Part 600 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.

(g) *Fuel.*

(1) Gasoline and diesel fuel for gasoline- or diesel-powered automobiles; or

(2) Electrical energy for electrically powered automobiles; or

(3) Alcohol for alcohol-powered automobiles; or

(4) Natural gas for natural gas-powered automobiles.

(h) *Fuel economy.* (1) The average number of miles traveled by an automobile or group of automobiles per volume of fuel consumed as calculated in this part; or

(2) The equivalent petroleum-based fuel economy for an electrically powered automobile as determined by the Secretary of Energy.

(i) *Manufacturer.* 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 the control of such manufacturer, assembler, or importer in connection with the distribution of new automobiles.

(j) *New automobile.* Any passenger automobile, medium duty passenger vehicle, or light truck for which a fuel economy label is required under the Energy Policy and Conservation Act (42 U.S.C. 32901 *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.

(k) *Range of fuel economy.* The range of city, highway, or combined 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 Part 600, and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, or accepted by the U.S. Environmental Protection Agency.

(l) *Ultimate purchaser.* The first person, other than a dealer purchasing in his or her capacity as a dealer, who in good faith purchases a new automobile for purposes other than resale, including a person who leases such vehicle for his or her personal use.

(m) *Vehicle configuration.* The unique combination of automobile features, as defined in 40 CFR Part 600.

3. Section 259.2 is revised to read as follows:

#### § 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 automobile<sup>1</sup> unless such representation is accompanied by the following clear and conspicuous disclosures:

(1) If the advertisement makes:

(i) Representations about city, highway, and combined fuel economy, or any combination of the three, the advertisement must disclose the applicable estimated fuel economy information for each type of fuel

<sup>1</sup> 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 of the vehicle or vehicles advertised.

economy represented in the advertisement;<sup>2</sup>

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

(iii) A general fuel economy claim without reference to any estimated fuel economy determined pursuant to EPA requirements, the estimated city fuel economy must be disclosed.<sup>4</sup>

(2) That the U.S. Environmental Protection Agency is the source of the estimated "city fuel economy," "highway fuel economy," and "combined fuel economy," and that the numbers are estimates.<sup>5</sup>

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

(1) The "expected range of fuel economy" or similar language, 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 fuel economy range or highway fuel economy range or combined fuel economy range or any combination of the three), 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" or similar language as a basis for comparing the fuel economy of two or more automobiles, such

<sup>2</sup> For purposes of §259.2(a), the "city fuel economy," the "highway fuel economy," and the "combined fuel economy" must be those applicable to the specific model type being advertised. Fuel economy estimates assigned to model types (*see* 40 CFR 600.208-08(a)(2)), should not be used for other vehicles in a car line that have different fuel economy ratings. 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."

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

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

<sup>5</sup> The 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 video, if the estimated mpg appears in the visual, the disclosure must appear visually; if the estimated mpg is audio, the disclosure must be audio.

comparison must be made to the same type of range (*i.e.*, city, highway, or combined).<sup>6</sup>

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

(1) The advertisement also discloses the "estimated city fuel economy," the "estimated highway fuel economy," and/or the "estimated combined fuel economy" as required by §259.2(a), and the disclosure required by §259.2(a), and gives the "estimated city fuel economy," the "estimated highway fuel economy," and/or the "estimated combined fuel economy" figure(s) substantially more prominence than any other estimate;<sup>7</sup> provided, however, for any advertising medium in which any other estimate is used in the audio, equal prominence must be given the "city fuel economy," the "highway fuel economy," and/or the "combined fuel economy" figure(s);<sup>8</sup>

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

(3) The driving conditions and variables simulated by the test which

<sup>6</sup> For example, an advertisement could not promote a vehicle's fuel economy by comparing the vehicle's estimated highway fuel economy to the city estimates of other vehicles in its class.

<sup>7</sup> For example, the Commission regards the following as constituting "substantially more prominence:"

For video: If the estimate derived from the non-EPA test appears in the visual portion, the estimated city, highway, and/or combined mpg should appear in numbers twice as large as those used for any other estimate, and remain on the screen at least as long as any other estimate. Alternatively, if the estimate derived from the non-EPA test appears in the visual portion, the estimated city, highway, and/or combined mpg should (1) appear simultaneously and with at least equal prominence as the other mileage estimate(s) in the visual portion, and (2) be stated in the audio portion. Each visual estimated city, highway, and/or combined mpg should be broadcast against a solid color background that contrasts easily with the color used for the numbers.

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

<sup>8</sup> For example, the Commission regards the following as constituting equal prominence: The estimated city, highway, and/or combined mpg should be stated, either before or after each disclosure of such other estimate at least as audibly as such other estimate.

differ from those used to measure the "estimated city fuel economy," the "estimated highway fuel economy," and/or the "estimated combined fuel economy" and which result in a change in fuel economy, are clearly and conspicuously disclosed;<sup>9</sup> 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.

(d) If an advertisement contains an estimated cruising range for an alternative fueled vehicle that is not determined in accordance with FTC's Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles (16 CFR Part 309), the advertisement must disclose clearly and conspicuously:

(1) The estimated cruising range required on the FTC label (16 CFR Part 309) with substantially more prominence than any other estimate; provided, however, for any advertising medium in which any other estimate is used only in the audio, equal prominence must be given the estimated cruising range that is required on the FTC label;<sup>10</sup>

(2) The source of the cruising range estimate; and

(3) Any material differences between the method used and the method required by the FTC's labeling requirements at 16 CFR 309.22.

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

[FR Doc. E9-9649 Filed 4-27-09; 8:45 am]

**BILLING CODE 6750-01-S**

<sup>9</sup> For 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, and 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.

<sup>10</sup> *See* footnotes 7 and 8 for guidance on prominence.