

CLIENT ALERT

Stricter Rules for Fuel Economy Advertising Are on the Horizon, But Are Unlikely to Put the Brakes on Consumer Class Actions

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The Federal Trade Commission (FTC) and U.S. Environmental Protection Agency (EPA) are both considering tightening rules governing the advertising of vehicle fuel economy. New federal regulations, however, may not stem the recent tide of consumer class actions alleging that auto manufacturers have misled consumers with inaccurate miles-per-gallon (MPG) claims.

Since 1975, the FTC has published its Fuel Economy Guide, which advises auto manufacturers and dealers to prominently disclose their vehicles' estimated city and highway MPG whenever they make fuel economy claims.¹ These MPG estimates must be based on EPA-mandated testing procedures.² FTC began soliciting comments on revisions to its Fuel Economy Guide in 2009. In May 2014, FTC issued its most specific questions to date, inviting the public to comment on the following issues:

- Whether a general fuel economy claim (e.g., "XYZ car gets great mileage") should be accompanied by a specific mpg disclosure to prevent consumer deception or unfairness.
- Whether an advertisement is unfair or deceptive if it provides only one type of mileage rating (e.g., an advertisement that only provides highway mpg).
- Whether an unspecified mpg claim (e.g., "37 mpg") is deceptive if the advertisement fails to identify whether the rating is city, highway, or combined.
- How consumers understand "up to" mpg claims, which sometimes appear in ads (e.g., "up to 45 mpg").
- Whether the combined EPA mpg rating should serve as the default disclosure for unspecified fuel economy claims (instead of the city mpg as currently indicated in the Guide).
- Whether the Guide should advise marketers to avoid statements that imply a linear relationship between mpg and fuel costs.
- Whether fuel economy advertisements containing mpg claims should identify EPA as the source of the ratings.

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- Whether FTC should provide additional guidance regarding disclaimers that the EPA ratings are only estimates.³

Among the comments received by FTC was a letter from a coalition of consumer and environmental groups endorsing more stringent FTC guidelines on each of these issues, and urging the FTC to bar any fuel economy claims that are not based on EPA-approved testing. The letter advocated an even more rigorous approach on certain issues—suggesting, for instance, that any highway-only MPG claims could be misleading because a consumer would need to travel local roads to get to a highway or could encounter highway congestion.

At the same time, EPA signaled in mid-July that it is considering a new regulatory initiative that would require automakers to road-test their own fuel economy claims in addition to complying with existing requirements. Neither the FTC nor EPA have indicated a timeframe for issuance of proposed rules, which would need to go through the formal notice-and-comment process.

FTC's and EPA's actions are believed to be reactions to a recent rash of complaints and class action lawsuits against several automakers alleging that consumers have been harmed by false and misleading fuel economy claims. New regulations, however, are unlikely to provide relief from these consumer class actions: a recent federal court decision in Colorado held that the Energy Policy and Conservation Act of 1975 (which authorized EPA's fuel economy program) and the FTC's Fuel Economy Guides did not preempt state consumer protection claims for false and misleading advertising. Indeed, stricter FTC guidelines could open the door to even more consumer class actions in this area by expanding the range of potential FTC regulatory violations that could form the basis for state false advertising claims.

We will continue to monitor these and other imminent regulatory actions on fuel economy advertising, as well as their potential impact on ongoing and future class action litigation.

¹ 16 C.F.R. Part 259.

² 40 C.F.R. 600.209-85.

³ Guide Concerning Fuel Economy Advertising for New Automobiles 79 FR 27820 (May 15, 2014).

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