



Warnings: What's Working, What's Not

Proposition 65 Clearinghouse

September 23, 2019

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Panel:

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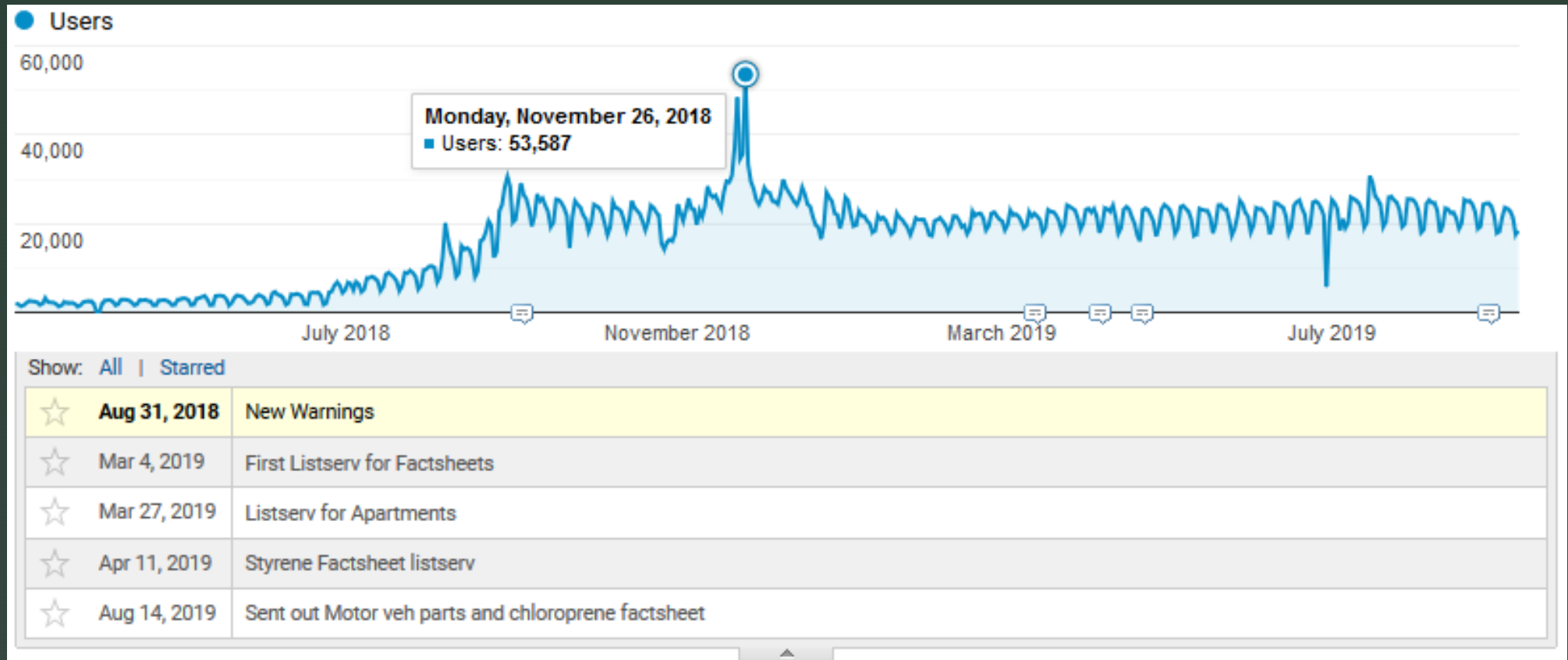
Partner, Sidley Austin

David Roe

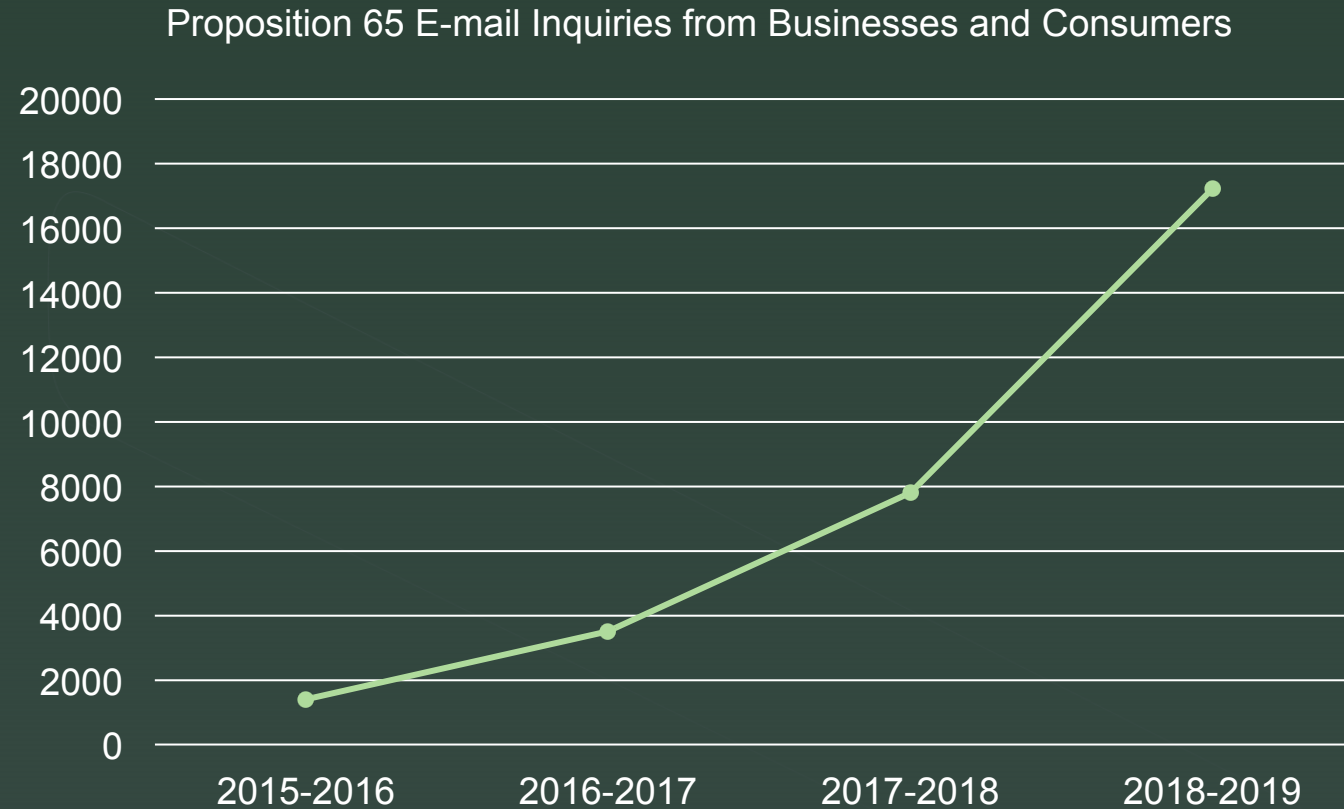
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Proposition 65 Inquiry Increase



	2015-2016	2016-2017	2017-2018	2018-2019
Daily phone consultation inquiries/ requests from businesses and consumers	10-15	10-20	15-30	10-20



Use Real Sugar
ONLY 16 CALORIES A LEVEL TEASPOON

Use Real Sugar
NO WARNING STATEMENTS

Use Real Sugar
NO MAN-MADE CHEMICALS

Use Real Sugar
IF YOU KNOW WHAT'S GOOD FOR YOU

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INITIAL RESPONSES BY REGULATED INDUSTRY TO NEW PROPOSITION 65 WARNING REGULATIONS

- ➔ CHAOS
- ➔ CONFUSION
- ➔ CONSTERNATION

INITIAL RESPONSES BY REGULATED INDUSTRY TO NEW PROPOSITION 65 WARNING REGULATIONS

- ➔ MANY BELIEVED THE REGULATIONS CHANGED *WHETHER TO WARN*, NOT JUST *HOW TO WARN*.
- ➔ THEN, MAJOR CONFUSION PERSISTED OVER WHETHER THE “SAFE HARBOR” FORMS OF WARNING WERE MANDATORY, VOLUNTARY OR SOMETHING IN BETWEEN.

OTHER COMMON TOPICS OF CONFUSION, EVEN FOR SOPHISTICATED COMPANIES WITH COMPLIANCE RESOURCES, INCLUDED THE FOLLOWING:

1. When long-form and short form warnings could be used.
2. Disbelief that “safe harbor” terms require “duplicate warnings” for internet sales.
3. Internet warnings—who, what, when, where, why and how.
4. Retailers believed that the new warnings required them to demand identification of ALL Proposition 65 listed chemicals in every product they sold.
5. Retailers believed that only “safe harbor” warnings were legally permissible.
6. Manufacturers tried to “offload” all warning obligations downstream to “California retailers only.”
7. What do “authorized agents” do and are they mandatory?
8. Why does everyone in the chain of commerce still get sued no matter what contractual allocations of responsibility they agree upon?

- ***ADDITIONAL TOPICS OF CONCERN:***

Many entities do not understand that the “safe harbor” form of warning requires use of category specific warning regimes—such as for furniture—if those are provided for in regulations.

There is particular confusion over warnings for foods, including dietary supplements.

There is a debate within the regulated community whether truncated form warnings can be used for foods. The regulations strictly interpreted may not provide for this warning option. Informal guidance has opened the possibility.

Allocation of Responsibility

- 27 CCR § 25600.2
 - Regulations are intended to minimize the burden on retail sellers of consumer products, **except** where the retail seller itself is responsible for introducing a listed chemical.
 - Manufacturer may comply by either (1) providing a warning on the product label or labeling that satisfies Section 25249.6 or (2) providing a downstream notice to retailer.
 - Proposed amendment to downstream notice regulation permits manufacturer to send notice to the authorized agent of business to which it transfers the product.
 - Prop 65 contractual terms may allocate legal responsibility within the supply chain.



Warning Alternatives

- Standard safe harbor warning – identify one listed substance for each endpoint
- Short form warning
 - Adopted because of limited packaging size
 - Limits information provided to consumers
 - OEHHA may revisit short form warning regulation to limit application – i.e. only allow it on smaller packages
 - Practical drawbacks to short form warnings
- Occupational product warnings

Pros and Cons of Testing v. Prophylactic Warnings

- Compliance testing and exposure analyses can be expensive, especially when many products at issue
- Variance in test results between batches/lots can further complicate testing programs
 - E.g., heavy metal content can vary from lot to lot in a wide array of food products
 - Plaintiffs can issue notices of violation if they test the “right” lot
- However, potential unintended consequences if warnings are added without testing:
 - Impact sales (perhaps nationwide) for no reason
 - Concession of substances in product/false representation

Retailer Perspective

- Warning “dumping”
 - Sticker labels just for CA markets
- E-commerce vs brick and mortar issues
- Does the opportunity to cure provision work?

What's Next?

- ➔ More regulatory changes
 - Short Form
 - Manufacturer vs Retailer
 - Tailored warnings
 - Internet warnings
- ➔ Litigation
- ➔ Settlements



Questions?