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## 5 Years Later, The Law That Saved The CPSC

By **Juan Carlos Rodriguez**

Law360, New York (August 14, 2013, 6:26 PM ET) -- Five years after Congress passed the Consumer Product Safety Improvement Act in response to a scandal over lead-tainted children's toys, the Consumer Product Safety Commission credits the law with rescuing the once beleaguered agency, and lawyers say the consumer product practice area has bloomed.

Since the law was passed in 2008, the CPSC has seen its staff increase by about 50 percent, to around 540, and its budget almost double to \$114 million. And the commission has taken almost 100 new actions mandated by the act, which regulates the manufacture, distribution and sale of consumer products, prompting businesses to focus on complying with the law.

"The CPSIA saved CPSC. We reached a point in 2007 and 2008 where we had less than 380 staff, and a budget that did not allow us to truly meet our mission," said commission spokesman Scott Wolfson. "With most of the requirements of the CPSIA having been implemented, we are a bigger, stronger and more impactful regulatory agency. ... We are not longer an agency operating in crisis."

Matthew R. Howsare, a consumer product safety attorney who joined Mintz Levin Cohn Ferris Glovsky & Popeo PC this year after leaving his position as chief of staff and chief counsel to CPSC Chairman Inez Tenenbaum, says the act made the commission relevant again.

"From my perspective of having worked in private practice before CPSIA was passed, and recently returning to private practice after working with the chairman for four years, I can easily say that the CPSIA significantly increased the CPSC's importance within the legal industry," Howsare said. "While the CPSC was always relevant to lawyers prior to the CPSIA, law firms weren't necessarily developing practice areas dedicated to consumer product safety, because there wasn't as much activity coming out of the agency as there is now."

Making sure toys don't contain high levels of lead was a priority for the act, but it covered a lot of other ground as well. For instance, it led to the creation of the SaferProducts.gov database, where consumers can register product complaints. It also mandated third-party premarket testing for children's products and created mandatory standards for cribs and other infant and toddler products, as well as children's toys.

Consumer advocates have cheered the law's accomplishments, which Wolfson says include an 80 percent decrease in lead content-related toy recalls since it was passed.

"Today's families are far less likely to face the terrible consequences of a toy laced with lead or a poorly designed crib," said Sally Greenberg, the National Consumer League's

executive director, in a statement celebrating the fifth anniversary of the law. "We know that CPSIA reforms will work as well to save lives and prevent injuries."

To achieve these safety improvements, the act has forced businesses to devote more resources toward making sure the products they make won't run afoul of its requirements. This has produced a spike in the consumer product safety practice, according to Charles E. Joern Jr. of the Joern Law Firm.

"[First,] the statute and its implementation are complex. As a result, businesses have had to use legal counsel knowledgeable in this area to ensure the necessary regulatory compliance," Joern said. "Second, the CPSC is increasing its enforcement efforts, and a failure to properly comply with consumer product safety laws exposes businesses to greatly enhanced civil — and even criminal — penalties."

The CPSIA increased the maximum penalty for each violation of the Consumer Product Safety Act, the Federal Hazardous Substances Act or the Flammable Fabrics Act from \$8,000 to \$100,000, and maximum penalties for a related string of violations from \$1.8 million to \$15 million.

For example, clothing retailer Ross Stores Inc. in June agreed to pay a \$3.9 million civil penalty to resolve charges that it had knowingly failed to report to the commission immediately, as required by federal law, that it had sold or held for sale about 23,000 children's upper outerwear garments with drawstrings at the neck or waist.

Violation prevention has also taken on a newly important role. The CPSC has added muscle to its oversight of products coming into the U.S. from abroad, with increased surveillance at domestic ports and the 2011 launch of its first foreign office, in Beijing. Wolfson says that means dangerous products are caught before they reach consumers.

"We have hired additional port investigators, and we've invested in our relationship with Customs and Border Protection," Wolfson said.

He says the commission now employs staff who look at a database of incoming shipping manifests to see what's in a cargo shipment and who the foreign manufacturer and U.S. importer are.

"We can see that while it's in transit so that we can be ready at a certain U.S. port to decide whether to inspect it or process it through import," he said.

But Lee L. Bishop, a product safety attorney at Miles & Stockbridge PC, says smaller businesses have found it difficult to defend themselves against the bigger stick the commission has been swinging.

"There's been a huge pressure and an increase in the regulation of children's products and toys, which is a direct result of the law. But the problem with that, from the business side, and from the consumer side, is that they've really squeezed out the little guys. The small manufacturers, the craft manufacturers," Bishop said.

According to Bishop, the commission has taken almost every opportunity to regulate toy and children's product manufacturers as aggressively as possible. In fact, he says, complaints about the commission going too far led Congress to amend the CPSIA in 2011 to curtail its discretion in some matters.

But Wolfson says the commission is reaching out to small businesses to help them navigate the new legal landscape.

"We realize that many companies hire outside counsel or use in-house counsel to work

with CPSC, but our reality is also that there are small businesses that can't afford to hire counsel, so we're working with them directly in certain circumstances," he said.

He says the commission's Office of Education, Global Outreach and Small Business Ombudsman does education and outreach activities for all those interested in the commission's activities.

"We've become the proactive regulator that we have striven to be since the start of Chairman Tenenbaum's tenure," Wolfson said. "What we finally have is a product safety system that parents thought was in effect years ago but is now a reality."

--Editing by Kat Laskowski and Katherine Rautenberg.

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