

# Small Business Notes

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## **President Biden Directs Agencies to Suspend Rulemaking Pending Further Review**

On January 20th, Ron Klain, Chief of Staff to the President, sent a memorandum to the heads of executive departments and agencies asking that those persons take the following steps “...to ensure that the President’s appointees or designees have the opportunity to review any new or pending rules:”

1. Subject to any emergency situations or other urgent circumstances identified by the Office of Management and Budget, to propose or issue no rule in any manner until an agency or department head, appointed after January 21 reviews and approves the rule.
2. Immediately withdraw from Federal Register publication any rules that have earlier been sent for publication to allow for the review and approval noted above.
3. For rules which have been published, or which have been issued in any manner, but have not yet taken effect, consider delaying implementation for 60 days from January 20, 2020. For those rules which raise no substantial issues of fact, law, or policy no further action is needed. For those rules which do raise substantial questions of fact, law, or policy the agency should notify the Office of Management and Budget and take action in consultation with the Office of Management and Budget Director.
4. Exclude from the actions of paragraphs 1 through 3 any rule subject to statutory or judicial deadlines. These rules should be identified to the Office of Management and Budget as soon as possible.
5. Seek prompt Office of Management and Budget review of any rules that the agency believes should be excluded from paragraphs 1 through 3 because the rules affect critical health, safety, environmental, financial, or national security matters.
6. Comply in all matters with all Executive Orders relating to regulatory Management.

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## **New Edition of A Legal Guide To Privacy and Data Security Publication Now Available Online**

The 2021 edition of *A Legal Guide to Privacy and Data Security* is now available online at [mnsbao.com](https://mnsbao.com). A collaborative effort of the Minnesota Department of Employment and Economic Development and the national law firm of Lathrop GPM, the publication is a primer on the principles, case law, and legislation affecting the ways in which a business collects, stores and shares information—including personal information about customers, consumers, and employees.

Those subjects have become more important to the competitive position of businesses with the use of new technologies, expansion of online sales, and the collection, analysis and sale of brokered information. The subjects have likewise attracted the attention of lawmakers several states (see, for example, HF 36 introduced in the Minnesota House of Representatives current [2021] session).

The Federal Trade Commission (FTC) has also taken an aggressive position on enforcing data privacy and security elements of existing laws. In December 2020, for example, the FTC proceeded with a complaint against Texas-based Ascension Data & Analytics, LLC for failing to ensure that one of its vendors was adequately securing the personal data of thousands of mortgage holders. The failure, according to the complaint, resulted in thousands of acts of unauthorized access to consumers' data including names, dates of birth, Social Security numbers, driver's license numbers, credit card and bank account numbers, and consumer credit files.

The settlement reached with the FTC requires Ascension to implement a data security program, including doing risk assessments on third party vendors, to undergo a biennial assessment of the effectiveness of its security program by an FTC approved outside party, and to have a senior company executive certify annually to the FTC that the company is in compliance with the settlement order.

The new edition of the DEED-Lathrop GPM publication contains a useful section on best practices for implementation and a section on sources of information on data privacy and security.

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## **New Federal Legislation Restores Rebuttable Presumption of Irreparable Harm in Trademark Cases**

On December 27, 2020, the Trademark Modernization Act of 2020 became law. That law codifies (at 15 U.S.C. 116(a)) the rebuttable presumption of irreparable harm to a trademark owner seeking an injunction against an infringer when the owner can make a *prima facie* case for the success of his claim. That presumption had existed in prior law but was lost when the U.S. Supreme Court held in 2006 in the case of *eBay v. MercExchange, LLC* 547 U.S.388 (2006) that a district court should not automatically grant an injunction upon a finding of patent infringement. Many, but not all, circuits extended that decision to trademark cases. The codification extends the rebuttable presumption to all trademark cases under the Lanham Act.

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Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at [Small Business Notes](#)

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**Department of Employment and Economic Development**

1<sup>st</sup> National Bank Building, 332 Minnesota, Suite E200, Saint Paul, MN 55101-1351  
651-259-7114 | Toll Free: 800-657-3858 | Fax: 651-296-5287 | TTY/TDD: 651-282-5909 | [MN DEED](#)

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