

WEBINAR

The Biden Administration and Anti-Discrimination: What's Next?

MARCH 5, 2021

Speakers: Debo P. Adegbile, Brenda E. Lee, Peggy Otum and
Laura E. Schneider



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WEBINAR

Speakers



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Agenda

- U.S. Political Outlook
- Top Issues
- How to Prepare

A low-angle photograph of the U.S. Capitol building's dome and columns. The sky is bright blue with scattered white clouds. A semi-transparent red rectangular box is overlaid in the center, containing the title text. An American flag is visible on a pole in front of the building's columns.

U.S. Political Outlook



The Biden Presidency

Return to Vigorous Enforcement

- President Biden has nominated well-respected civil rights leaders, including Vanita Gupta and Kristen Clarke, underscoring a commitment to civil rights enforcement

Senate Will Shape Governance Approach

- Republicans and Democrats established a power-sharing agreement for floor proceedings and committee assignments (50-50 split)
- The Biden Administration will need Republican compromise to implement major legislative initiatives
- The Biden Administration can confirm executive nominees without Republican support, but Republican opposition will impact pace



Four Pillars



COVID-19/Healthcare

Controlling COVID-19, treatment, testing, vaccine distribution



Economic Recovery

COVID-19 relief package, infrastructure, state payments, school and hospital funding



Racial Equality

Diversity and fairness



Environment

Climate and environmental justice



President Biden's Commitment to Racial Equality

“I believe this nation and this government need to change their whole approach to the issue of racial equity We need to make equity and justice part of what we do every day — today, tomorrow, and every day We’re going to continue to make progress to eliminate systemic racism, and every branch of the White House and the federal government is going to be part of that effort.”

January 26, 2021



Top Issues



Anticipated Executive Branch Oversight Activity



DOJ

- Renewed focus on civil rights enforcement



CFPB

- Renewed focus on fair lending and anti-discrimination



NLRB

- Expanded collective bargaining enforcement



EEOC

- Increased investment and renewed focus on workplace protections



DOL

- Focus on workplace protections and collective bargaining enforcement through Civil Rights Center



HUD

- Renewed focus on fair housing and racial equity



FHFA

- Renewed focus on fair and affordable housing



EPA

- Focus on environmental justice



OCC

- Potential CRA rule changes



HHS

- Focus on civil rights and discrimination, emphasis on COVID



DOI

- Focus on environmental justice



Key Executive Branch Nominees and Appointees



Merrick Garland
Attorney General



Lisa Monaco
Dep. Attorney General



Vanita Gupta
Assoc. Attorney General



Kristen Clarke
AAG Civil Rights



Rohit Chopra
Head of CFPB



Marcia Fudge
HUD Secretary



Marty Walsh
Secretary of Labor



Xavier Becerra
HHS Secretary



Miguel Cardona
Secretary of Education



Michael Regan
EPA Administrator



Civil Rights Priorities – Overview



Increased funding for enforcement (EEOC, DOJ Civil Rights, DOL Office of Federal Contract Compliance Programs)



Expanded enforcement mandates (e.g., CFPB) and higher penalties



Additional protection for labor organizing and penalties for interference



Emphasis on fair housing and fair lending



Scrutiny of employment data



New workplace protections



Emphasis on environmental justice



Focus on healthcare disparities



Key Executive Actions to Date

- ✓ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- ✓ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- ✓ Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies
- ✓ Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States
- ✓ Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis
- ✓ Tackling the Climate Crisis at Home and Aboard
- ✓ Ensuring an Equitable Pandemic Response and Recovery
- ✓ Protecting Worker Health and Safety
- ✓ Protecting the Federal Workforce
- ✓ Foreclosure and Eviction Moratoriums
- ✓ Preserving and Fortifying the Deferred Action for Childhood Arrivals (DACA) Program
- ✓ Repealing the Immigration Ban on Individuals from Certain Muslim-Majority Countries

A New Day in Civil Rights Enforcement

Justice Department Drops Yale University Admissions Lawsuit

Updated Feb. 3, 2021

Dismissal of suit alleging discrimination against white and Asian-American applicants signals Biden administration's shift on civil-rights enforcement

January 25, 2021

Biden Administration Orders OSHA To Increase Enforcement Efforts

February 5, 2021

The Pendulum Swings: Newly Appointed Acting General Counsel of the NLRB Rescinds 10 Trump-Era General Counsel Memos

February 2, 2021

The Biden Administration Removes Limits on Agency "Guidance" – And Creates A New Agenda Enforcement Tool



Key Biden Civil Rights Priorities

- Fair Housing
- Fair Lending
- Environmental Justice
- Workplace Equity



Fair Housing and Fair Lending Priorities

Expand Enforcement and Enact New Protection

- Re-empower CFPB's Office of Fair Lending and Equal Opportunity to enforce fair lending
- Create a new public credit reporting and scoring division within CFPB
- Create additional consumer protections in the mortgage and rental housing industries with a private right of action for enforcement
 - ❖ *Relevant Agency Action: Foreclosure and Eviction Moratoriums*

Restore Disparate Impact Analysis

- Reverse Trump Administration efforts to increase the burden of proof for discrimination claims
 - ❖ *Relevant Executive Action: Housing Memorandum*

Expand Community Reinvestment Act

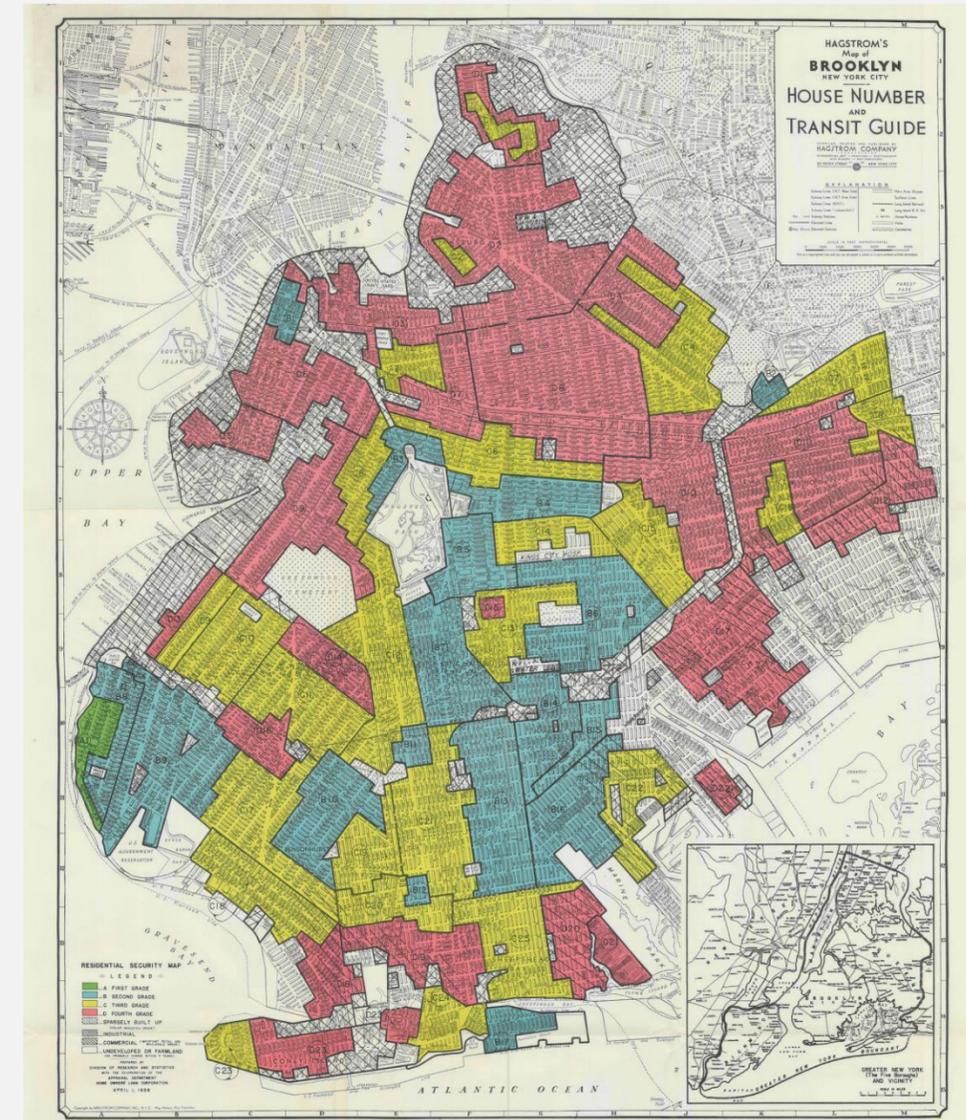
- Expand CRA to cover fintech, other non-bank lenders, mortgage companies, and insurance companies



What is Environmental Justice?

Origins: Systematic Racism & Redlining

- Unequal access to policymaking and uneven enforcement of environmental laws in low-income communities of color is rooted in the historical mistreatment of racial minorities in the U.S.
- Through “redlining,” banks and insurers concentrated minority homeowners in certain neighborhoods. Property values went down, and industry moved in. Many historically redlined districts now are the focus of EJ concerns





Defining Environmental Justice

“Fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

U.S. Environmental Protection Agency



Framing Environmental Justice

Equity: Harms & Benefits

- Disproportionate distribution of environmental negatives (harms, risks, and nuisances) to low-income communities, people of color, and indigenous communities
- Disproportionate distribution of environmental benefits to wealthy, white communities



Standard for Achieving Environmental Justice

Environmental justice “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”

U.S. Environmental Protection Agency



Existing Framework for Environmental Justice

In 1994, Executive Order 12898 incorporated EJ into federal government policy by:

- Directing each federal agency to make EJ part of its mission;
- Creating the Interagency Working Group on Environmental Justice; and
- Imposing requirements for public participation, research, and reporting by federal agencies.

Progress toward EJ has been inconsistent

- A 2019 GAO report found that most agencies “have not shown clear progress” toward their EJ goals



EPA Office of Environmental Justice

EPA's Office of Environmental Justice is the primary federal office working on EJ issues. Its core functions are:

- Providing grants and technical assistance to underserved communities
- Generating EJ guidance for other agencies
- Addressing Title VI civil rights complaints

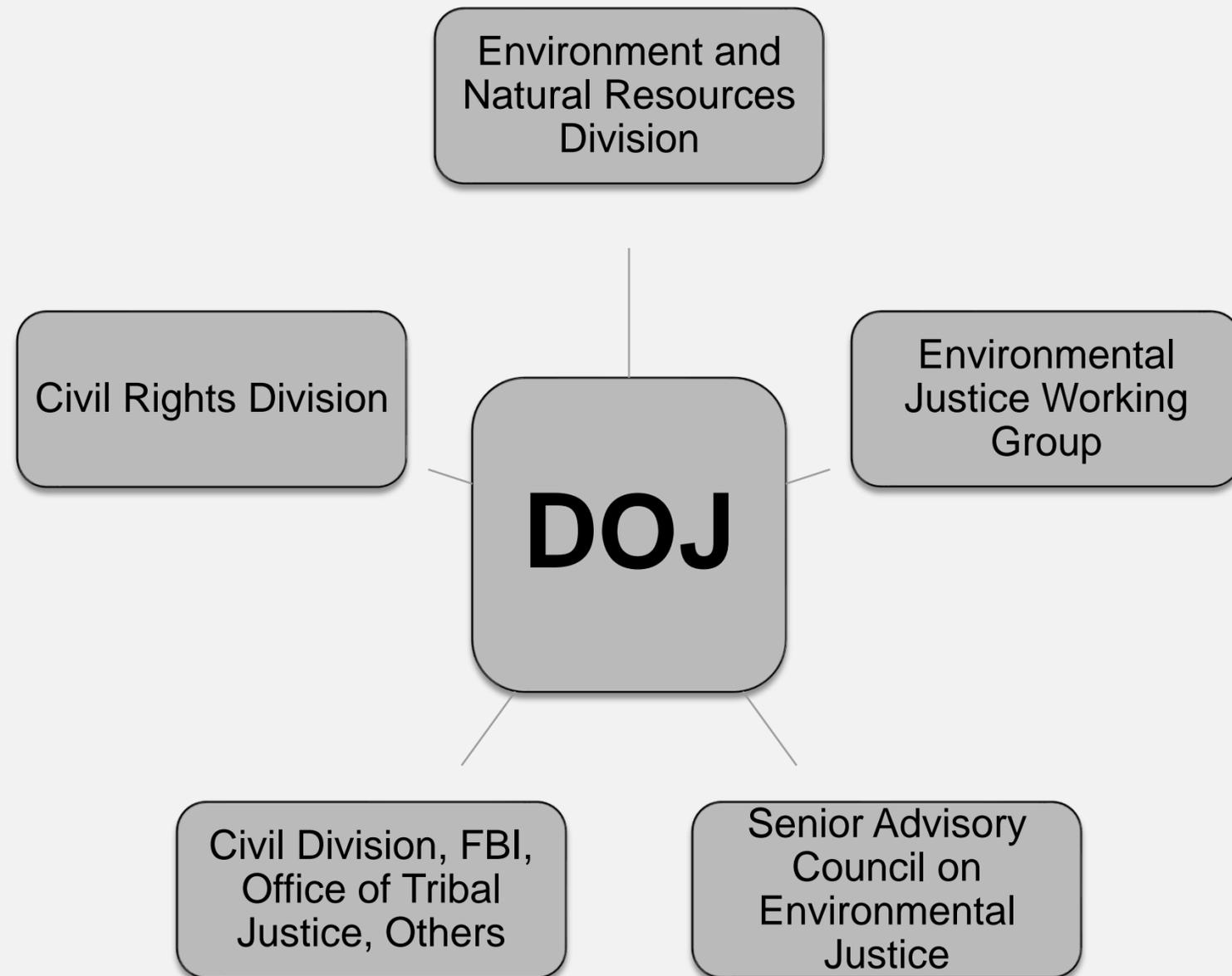
The office's primary substantive focuses are:

- Lead exposure
- Drinking water
- Air quality
- Hazardous waste sites

EPA's EJ Office has been criticized recently by EJ advocates and EPA's own Inspector General



Environmental Justice at DOJ





Environmental Justice Priorities

Prioritize Enforcement

- Prioritize environmental enforcement that impacts racial minorities and disadvantaged communities
 - ❖ *Relevant Executive Actions: Environmental Justice and Tackling the Climate Crisis*
- Establish Environmental Justice Division at DOJ
- Overhaul the EPA External Civil Rights Compliance Office

Commitment at White House

- Revise and reinvigorate the 1994 Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low Income-Populations
- Create advisory councils tasked with developing performance metrics on implementing Executive Order

Coordinate State Enforcement

- White House to encourage state monitoring and engagement
- States are increasing environmental justice enforcement, including with statutory authorization (e.g., California, New Jersey, Massachusetts, and Washington)



Workplace Equity Priorities

Expand Enforcement

- Increase funding for the EEOC, DOL's Office of Federal Contract Compliance Programs, and DOJ's Civil Rights Division, including funding for a dramatic increase in investigators in labor and employment agencies
- Prevent employees from being misclassified as independent contractors
- Enhance NLRB enforcement against bad faith bargaining
 - ❖ *Relevant Action: Removal of NLRB General Counsel*

Protect and Expand Collective Bargaining

- Create cabinet-level working group on promoting union organizing and collective bargaining
- Implement increased penalties for companies that interfere with collective bargaining efforts, including personal liability for executives and expanded debarment
- Require union neutrality agreements for all federal contracts
 - ❖ *Relevant Executive Actions: Worker Health and Safety; Protecting the Federal Workforce*

Increase Data Transparency

- Enhance data collection on earnings gaps by race and gender
- Require public disclosure of workforce and senior-level diversity
- Require public disclosure of racial and gender composition of boards for publicly traded companies



Workplace Equity Priorities, Cont.

Expand Employee Rights

- Enact paid family leave (up to 12 weeks family and medical leave)
- Increase federal minimum wage to \$15/hour and increase overtime protection
- Eliminate non-compete clauses, no-poaching agreements, and mandatory arbitration clauses
- Make worker misclassification a substantive violation of federal labor, employment, and tax laws with additional penalties
- Prevent retaliation against employees for discussing wages

Expand Workplace Harassment and Discrimination Protections

- Enact ***Paycheck Fairness Act*** to reduce wage gaps and increase penalties
- Enact ***Pregnant Workers Fairness Act*** to require reasonable accommodations
- Enact ***Equality Act*** to codify protections against discrimination based on gender identity and sexual orientation
 - ❖ *Relevant Executive Action: Gender Identity or Sexual Orientation*
- Enact ***Protecting Older Workers Against Discrimination Act*** to lower the burden of proof on age discrimination claims
- Enact ***BE HEARD in the Workplace Act***
 - Expand Title VII protections to include employers with fewer than 15 employees
 - Discourage nondisclosure agreements that prevent employees from speaking about workplace discrimination or harassment



Other Priorities and Initiatives

Algorithmic Bias

- Potential regulation of AI technologies
- Enforcement against algorithmic bias
 - ❖ *Relevant Executive Action: Housing Memorandum*
- Implementation of National Artificial Intelligence Initiative Act

Social Media Regulation

- Anticipated regulation of social media and technology companies
- Create a National Task Force on Online Harassment and Abuse

Voting Rights

- Increased corporate engagement on voting rights
- President Biden supports the Voting Rights Advancement Act



How to Prepare



How to Prepare

Conduct an issues inventory

- Consider, and continue to monitor, areas of greatest potential enforcement risk

Review existing policies and practices for potential changes based on anticipated legislation, executive action, and changing landscape

- Develop plan for revising policies and/or implementing new policies

Develop a proactive plan

- Consider your legislative and regulatory priorities and what your company can live with. How will you engage with policymakers to shape policy in your favor? Limit potential business risk?
- Survey key relationships: who are your champions and detractors?
- Assess consultants and trade organization memberships
- Develop investigative strategy for responding to inquiries

Rapid-response and planning

- Determine your key decision-makers when considering engagement with Congress
- Plan ahead: responding to a request or hearing invitation takes significant time
- Review past letters to agencies; new Administration staff may seek to respond to outstanding requests

Monitor parallel inquiries and litigation

- State AG enforcement, which grew under Trump Administration, will continue



Questions



Questions

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