Charles N. Kahn III
President & CEO

June 2, 2017

The Honorable R. Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Dear Secretary Acosta:

The Federation of American Hospitals (FAH) appreciates your commitment to undertake regulatory reform and reduce the regulatory burden on health care providers, as directed by the February 24, 2017 Executive Order. The FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. Our diverse membership includes teaching and non-teaching, short-stay, rehabilitation, long-term acute care, psychiatric, and cancer hospitals in urban and rural America, and they provide a wide range of acute, post-acute, and ambulatory services.

Our members are committed to ensuring patients receive high-quality care and believe a comprehensive review and repeal or revision of regulations that are outdated, ineffective, or otherwise overly burdensome will further our shared goals of improving health outcomes and efficiencies in care delivery. The attached document recommends various actions the Department of Labor (DOL) could take to implement regulatory reform and ease unnecessary burdens on hospital systems, while allowing more time for patient care.

We appreciate your attention to these critically important policies. We also look forward to working with you as you continue these efforts and would be happy to meet with you and your staff to discuss any of the recommendations.

Sincerely,

REGULATORY REFORM -- US DEPARTMENT OF LABOR

Provide Employer Flexibility Under FLSA Regulations for Overtime Pay

The Department should provide flexibility under Fair Labor Standards Act ("FLSA") regulations for employers to appropriately schedule their workforce (e.g., offer comp time in lieu of overtime) and should clarify the regulations for determining who is exempt from overtime pay to reduce the explosion of FLSA litigation. Last year, the DOL revised the regulations governing the so-called white collar exemptions from overtime pay by doubling the salary threshold needed to meet the exemption, which resulted in additional employees being eligible for overtime pay. While we support that the regulations have been enjoined by a federal court, it is unclear how the Department of Labor ("DOL") may address current FSLA regulations. While these regulations may be outdated and not reflective of the modern workplace, simply doubling the salary threshold to meet an exemption is not an appropriate means for sophisticated changes occurring in the workplace.

Continue Moratorium on Enforcement of Federal Contractor Requirements Against Hospitals Receiving TRICARE/Federal Health Care Payment Programs

The OFCCP should continue the current moratorium on enforcement of federal contractor status for hospitals. In recent years, the DOL's Office of Federal Contract Compliance Programs ("OFCCP") has attempted to extend its oversight and enforcement of federal contractor status to hospitals solely because they receive reimbursement under TRICARE, FEHPB and even federal health care reimbursement programs like Medicare Part C and D. Federal contractor status imposes enormous affirmative action recordkeeping and reporting burdens on hospitals that already are subject to other federal, state and local nondiscrimination laws. OFCCP offered some relief in 2014 by agreeing to a five-year moratorium on enforcement for TRICARE providers, including those receiving reimbursement from FEHBP and other health care programs.

Increase Flexibility of, and Revise and Clarify, Joint Employment Standards

The rules on joint employment and what constitutes an "independent contractor" should be revised and clarified, with flexibility for employers such as hospitals that often contract out for various services. On January 20, 2016, the DOL's Wage Hour Bureau issued *Administrator's Interpretation No. 2016-1* under the FLSA addressing joint employment. It provided an overly broad view of when joint employer liability attaches, and may apply expansively to employers, such as hospitals, that regularly contract out various services and functions and use various forms of staffing arrangements. The revised interpretation has caused confusion, is too broad, and has prompted complex litigation on joint employer liability.

Withdraw Requirement to Collect Salary Data under EEO-1 Report

The OFCCP and Equal Employment Opportunity Commission ("EEOC") should withdraw the EEO-1 requirement to report salary data. Under recent EEO-1 revisions, employers with

more than 100 employees and government contractors with more than 50 employees are required annually to report to the government certain workforce data, which beginning March 31, 2018, will include salary data. This will impose unnecessary data collection and reporting burden of confidential information, and given the broad aggregation of dissimilar jobs into artificial pay groupings, the regulation will not achieve its intended purpose of identifying salary discrimination.

Withdraw Speedy Election Rules

National Labor Relations Board ("NLRB") regulations permitting "speedy elections rules" should be withdrawn. These rules, which are designed to speed up significantly the process unions use to organize a workforce, unfairly disadvantage employers by allowing unreasonably short deadlines to challenge union organizing. They also limit employers' time to provide employees with complete information concerning union organization, and employees have to make decisions too quickly and without full information.

Reverse Trend Toward Micro Bargaining Units

A series of NLRB case law decisions making it easier for unions to organize much smaller portions of workforces within a large and diverse workforce, such as a hospital, should be reversed. These NLRB decisions represent a dramatic erosion of the standards and precedent embodied in NLRB regulations issued in 1987 for organizing in the healthcare industry, and unfairly disadvantage employers. The trend toward "micro" bargaining units should be reversed.

Increase Healthcare Employer Flexibility to Conduct Background Checks in the Pre-Employment Process

The EEOC should increase healthcare employer flexibility to conduct background checks during the pre-employment process. The EEOC has attempted to greatly limit an employer's ability to utilize background checks of candidates in the pre-employment process. At the same time, hospitals are subject to numerous state laws and regulations that mandate background checks and screening. Hospitals and healthcare organizations subject to state requirements must be permitted more flexibility so that they can appropriately screen potential employees and comply with state laws and regulations.