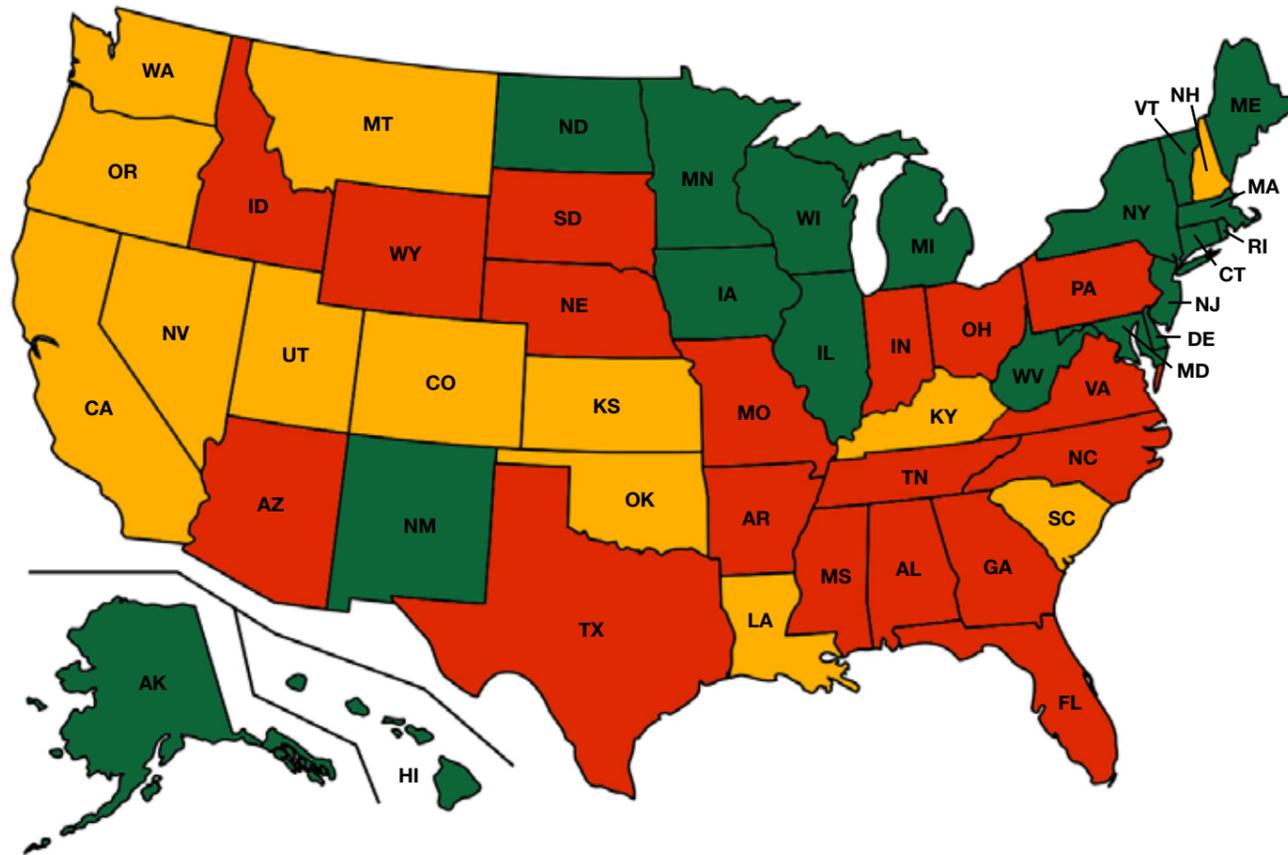


## Respecting Corporate Contracts: **State-by-State Risk Index**

Overview of state 'secrecy laws'  
and implications for commercial  
enterprises and public health

Fig. 1. How the 50 States Rate in Level of Risk



## Respecting Corporate Contracts: State-by-State Risk Index

Overview of state 'secrecy laws' and implications for commercial enterprises and public health.

This State-by-State Risk Index is intended to operate as a guide for companies concerned about state secrecy laws and the implications for commercial enterprises and public health.

The Index contains individualized risk profiles for every state in the USA, and assigns a risk evaluation ('high', 'medium' or 'low') based on the state's legislation, policies and practices in this area.

Companies looking to expand their business in the United States are advised to consult the risk profiles in this Index before investing. It is recommended that companies engage with state officials in medium and high risk states to request confirmation that their contractual rights and corporate interests will be respected, and that public and patient health will be protected.

### High Risk

- Alabama
- Arizona
- Arkansas
- Florida
- Georgia
- Idaho
- Indiana
- Mississippi
- Missouri
- Nebraska
- North Carolina
- Ohio
- Pennsylvania
- South Dakota
- Tennessee
- Texas
- Virginia
- Wyoming

### Medium Risk

- California
- Colorado
- Kansas
- Kentucky
- Louisiana
- Montana
- Nevada
- New Hampshire
- Oklahoma
- Oregon
- South Carolina
- Utah
- Washington

### Low Risk

- Alaska
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- New Jersey
- New Mexico
- New York
- North Dakota
- Rhode Island
- Vermont
- West Virginia
- Wisconsin
- District of Columbia

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# Introduction

Over the last ten years, eighteen states have adopted legislation or policies – commonly referred to as ‘secrecy laws’ – that undermine the interests of industry and create risks for public health.

Faced with opposition by pharmaceutical companies to the misuse of their medicines in executions, officials in these states have used secrecy laws in efforts to bypass controls put in place by companies to protect medicines from diversion and misuse.<sup>1</sup>

The medicines in question include the highly dangerous drug of abuse, Fentanyl, along with other opiates and schedule II controlled substances.

These laws and policies have serious implications for businesses, exposing companies to legal,<sup>2</sup> reputational<sup>3</sup> and fiscal risks.<sup>4</sup> As two global companies challenging these practices expressed in legal filings in July of 2017:

*“Any refusal by the state to disclose the manufacturers of its lethal injection drugs directly undermines [these companies’] interests, impeding their ability to preserve the integrity of their contracts.”<sup>5</sup>*

Secrecy laws and policies also create grave risks to patients and the public by undermining the integrity of supply chains for medicines in concerned states and nationally. In a separate legal filing from April 2017, two companies highlighted that:

*“[T]he use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines. Improperly procured medicines from unauthorized sellers are at risk of adulteration [and could] place patients [...] across the country at risk.”<sup>6</sup>*

Under secrecy laws and policies across the country, pharmaceutical companies seeking to identify whether their own medicines were purchased in violation of contract could be penalized and made subject to criminal and civil sanctions. Companies have an interest in and duty to track the movement of their drugs throughout the supply chain and enforce their contractual controls, and these laws risk penalizing companies for doing this.

The entrepreneur Sir Richard Branson has written that states’ circumvention of private contracts under the cover of secrecy laws should be a “red flag for any business”<sup>7</sup> considering investment in such states.

At present, state secrecy laws mainly impact companies in the healthcare and pharmaceutical industries, though the laws may be extended to other sectors in the future.

## Fiscal risks

*A number of international investors in the healthcare sector have made clear that preventing medicines’ misuse in executions is an important corporate governance issue. In 2014, a global pharmaceutical firm saw one of its shareholders publicly divest a \$70 million stake in the firm after it came to light that the manufacturer had not effectively restricted the sale of its products for use in executions. Secrecy laws and policies encumber companies’ efforts to track products and ensure that their drugs are not used in executions, putting companies at risk of such divestment.*

## Reputational risks

*When companies’ medicines are used in lethal injection executions, their products risk being unfairly linked to a controversial non-medical practice that the firms fundamentally oppose. In 2014 for example, two large pharmaceutical companies were publicly named in connection with a horrific botched execution in Oklahoma, which received international media coverage and led the White House to publicly announce a review by the Department of Justice. Association with executions can be extremely damaging to companies’ reputations, and secrecy laws prevent companies from anticipating in advance where states’ diversion of their drugs may expose them to this kind of reputational risk.*

## Legal risks

*Secrecy laws and policies harm companies’ efforts to protect themselves from legal liability resulting from instances where their products are used in executions. Two major pharmaceutical companies - one manufacturer and one wholesaler - were sued by family members of Dennis McGuire after McGuire’s execution went badly wrong in 2014. The lawsuit alleged that the companies should have known that the drugs “would cause unnecessary and extreme pain and suffering during the execution process.”*

*In addition, under certain secrecy laws, pharmaceutical companies are classified as members of the “execution team” despite their opposition to the misuse of their medicines in executions. This classification risks further subjecting companies to legal liability for their involvement in executions that have gone wrong.*

“Execution secrecy laws ... are designed to circumvent private contracts introduced by healthcare companies... – another red flag for any business.”

**Sir Richard Branson**

Fig. 1. How the 50 States Rate in Level of Risk

# Overview

## High Risk

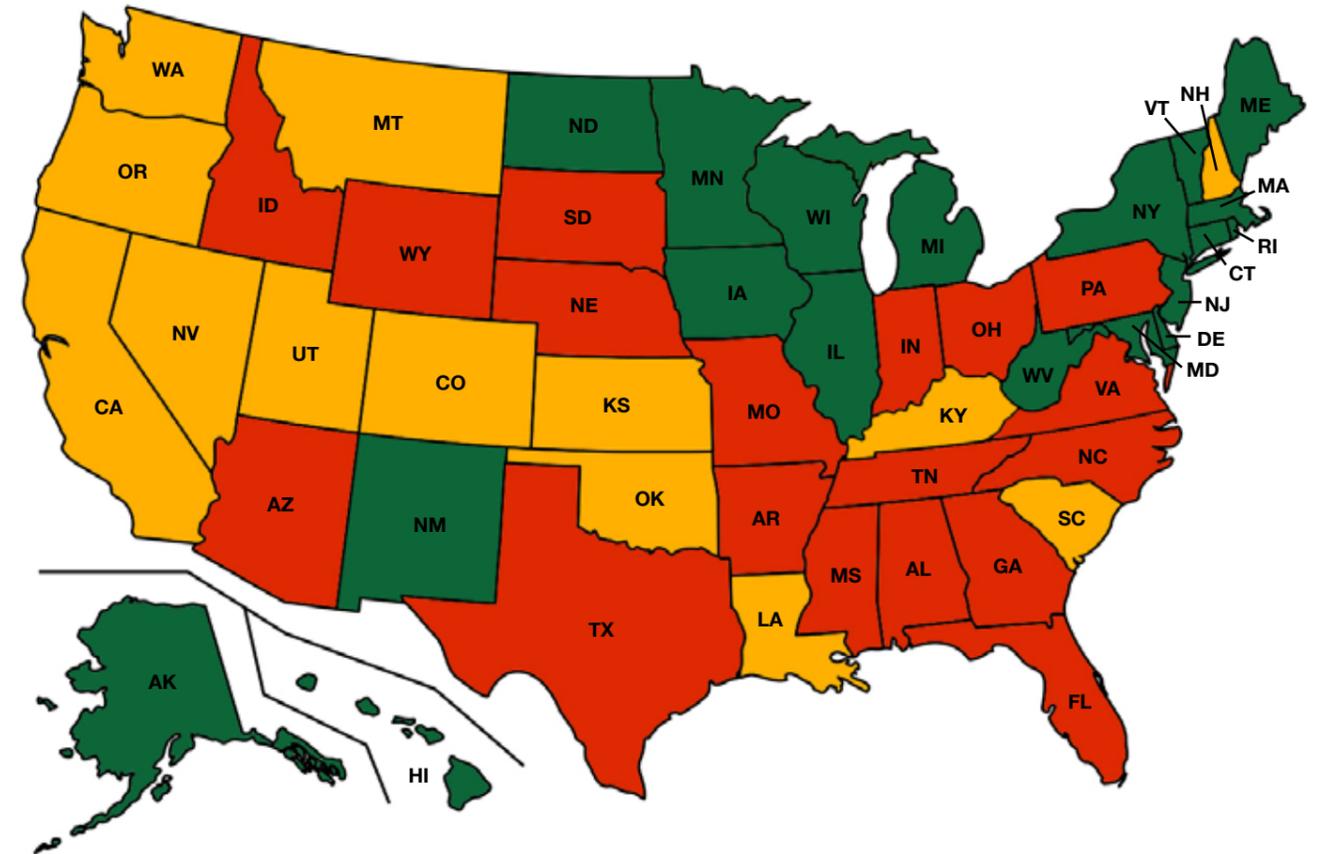
**Eighteen states** have legislation and/or policies obscuring critical information relating to medicines purchased for the purposes of lethal injection executions. These states have been designated 'high risk'.

## Medium Risk

**Thirteen states** either have not enacted secrecy legislation or policies, but are known to be actively attempting to violate companies' distribution controls, or have enacted secrecy legislation but have abandoned attempts to violate companies' controls. These states have been designated 'medium risk'.

## Low Risk

**Nineteen states and the District of Columbia** do not pose significant risks to companies because they have not adopted secrecy legislation and show no intention of breaching or circumventing company contracts and agreements. These states have been designated 'low risk'.



### High Risk

- Alabama
- Arizona
- Arkansas
- Florida
- Georgia
- Idaho
- Indiana
- Mississippi
- Missouri
- Nebraska
- North Carolina
- Ohio
- Pennsylvania
- South Dakota
- Tennessee
- Texas
- Virginia
- Wyoming

### Medium Risk

- California
- Colorado
- Kansas
- Kentucky
- Louisiana
- Montana
- Nevada
- New Hampshire
- Oklahoma
- Oregon
- South Carolina
- Utah
- Washington

### Low Risk

- Alaska
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- New Jersey
- New Mexico
- New York
- North Dakota
- Rhode Island
- Vermont
- West Virginia
- Wisconsin
- District of Columbia

## Arkansas

### A case study

In early 2017, the state of Arkansas announced its intention to carry out eight executions in 10 days, the largest mass execution in over half a century.

All three of the drugs that were intended to be used in the executions had been procured by the Arkansas Department of Correction (DOC) in breach of company control systems. Court transcripts also came to light suggesting that the Arkansas Attorney General had knowingly induced its supplier to violate contracts with pharmaceutical manufacturers.<sup>8</sup>

Affected companies wrote to Arkansas officials informing them of the existence of contractual supply-chain controls, and when it emerged that these controls had been violated, seeking the return of their products. The state refused to disclose to companies whether and how it had obtained their products, citing to its secrecy law.

Healthcare company **McKesson Corporation** conducted a detailed review and discovered that state officials had obtained **Pfizer Inc.** medicines through “*false pretense, trickery, and bad faith.*”<sup>9</sup> The implications for **Pfizer Inc.** and **McKesson Corporation** were serious, exposing both to financial, legal and reputational risk.

Despite repeated requests from both companies, state officials refused to return the products even after accepting a full refund. **McKesson Corporation** was forced to take legal action, bringing a suit against the Arkansas DOC in April of 2017, which temporarily stayed eight executions.<sup>10</sup>

Two additional companies, British **West-Ward Pharmaceuticals Corp.** and German **Fresenius Kabi LLC**, were similarly impacted by the control system breaches induced by Arkansas officials and filed a joint amicus brief in support of **McKesson Corporation's** suit,<sup>11</sup> noting the serious public health risks associated with secrecy and product diversion.

“The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”

**British West-Ward  
Pharmaceuticals  
Corp. and German  
Fresenius Kabi LLC**

## Methodology

This Index surveys the laws, policies, and practices of all 50 US states. Each state was analysed and assigned a risk evaluation (‘high’, ‘medium’ or ‘low’) based on its level of transparency in disclosing information related to correctional facilities’ drug supplies and respect for companies’ contracts and supply chain controls.

States that have enacted legislation or policies obscuring information relating to the purchase of medicines for use in executions were designated ‘high risk’. States that either have not enacted such legislation, but are actively seeking to violate companies’ distribution controls, or have enacted such legislation but are no longer seeking to violate companies’ controls, were designated ‘medium risk’. States that have not adopted such legislation and show no intention to violate were designated ‘low risk’.

This data was derived from an analysis of state law, relevant news coverage, and a survey of Freedom of Information Act (FOIA) responses.

The Index was prepared by experts at the **Lethal Injection Information Center** at Reprieve, an organization that provides free and confidential advice to companies seeking to protect their medicines from misuse.

For more on the **Lethal Injection Information Center**, please visit [www.lethalinjectioninfo.org](http://www.lethalinjectioninfo.org).

## High Risk States

“If [Alabama] prisons have purchased Akorn, Inc. products directly or indirectly for use in capital punishment we ask that you immediately return our products for a full refund.”

**Akorn, Inc.**

*The following eighteen states have enacted legislation and/or implemented policies obscuring critical information relating to medicines purchased for the purposes of lethal injection executions. These states have been designated ‘high risk’.*

### **Alabama**

Since 2013, the Alabama DOC) has adopted the position that all information related to execution matters, including the source of its lethal injection products, is confidential and outside the purview of public records requests.<sup>12</sup> Alabama’s secrecy policy is one of the strictest in the US, making all documents associated with an execution confidential,<sup>13</sup> and public records surveys reveal that the DOC uses this policy to justify refusing to provide any records related to executions, regardless of content. This policy creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Affected companies oppose secrecy and the misuse of medicines in executions. These companies have sent numerous letters to the Office of Governor, Attorney General, and Head of the DOC in Alabama, asking that their efforts and intentions be respected. **Akorn, Inc.**, for example, wrote to the DOC in 2015, asking it to confirm if it had purchased its products against its wishes, writing, “If [Alabama] prisons have purchased Akorn products directly or indirectly for use in capital punishment we ask that you immediately return our products for a full refund.”<sup>14</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Alabama has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Alabama officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

### **Arizona**

Arizona has a secrecy provision that became effective in 2010. A.R.S. § 13-757 makes confidential “persons who participate or perform ancillary functions in an execution.”<sup>15</sup> The Arizona DOC has interpreted this provision to apply to all information related to the suppliers and manufacturers of its execution drugs, as well as the specifics about the drugs themselves. This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Affected companies oppose secrecy and the misuse of medicines

in executions. These companies have written directly to the Arizona DOC expressing this position. For example, in 2011 Arizona adopted a one-drug execution protocol using pentobarbital. However, later that year the only licensed supplier of pentobarbital in the United States, **Lundbeck A/S**, implemented measures to ensure that its products would not be distributed to prisons for the purposes of carrying out executions, noting that “Lundbeck adamantly opposes the distressing misuse of our product in capital punishment.”<sup>16</sup>

A recent investigation overseen at Emory University hospital in Atlanta found that Arizona is among a handful of states stockpiling execution drugs that are in short supply and which would otherwise be used collectively to treat more than 11,000 US patients in life-or-death procedures.<sup>17</sup> Many of the drugs used in executions are listed on the World Health Organisation’s Model List of Essential Medicines, which presents the minimum needs for a basic healthcare system, but are in dangerously short supply in the United States today.

Drug manufacturers **Fresenius Kabi LLC** and **West-Ward Pharmaceuticals Corp.** have raised concerns around the public health impact of these practices, noting that “The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”<sup>18</sup>

## Arkansas

Arkansas passed A.C.A. § 5-4-617 in 2015. This statute specifies that entities and persons who “compound, test, sell, or supply the drug(s), medical supplies, or medical equipment are to remain confidential.”<sup>19</sup> This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Although Arkansas’ statute expressly permits that certain information related to the manufacturers of its medicines must be released to the public in redacted form,<sup>20</sup> in practice, the DOC has refused to disclose redacted package inserts and labels. In 2017, two separate judges in the Circuit Court of Pulaski County ordered the DOC to disclose these records after the DOC improperly refused to do so, and both decisions have been upheld by the Arkansas Supreme Court.<sup>21</sup>

In April of 2017, it was reported that the state of Arkansas had circumvented company contracts and agreements, and obtained products whose use had been restricted. Affected companies wrote to Arkansas officials informing them of the existence of contractual supply-chain controls, and when it emerged that these controls had been violated, seeking the return of their products. The state refused to disclose to companies whether and

“Lundbeck A/S adamantly opposes the distressing misuse of our product in capital punishment.”

## Lundbeck A/S

how it had obtained their products, citing to its secrecy law.

Healthcare company **McKesson Corporation** conducted a detailed review and discovered that state officials had obtained its products through “**false pretense, trickery, and bad faith**”, intentionally obscuring the drugs’ intended purpose and reneging on a promise to return them after a refund was provided. After officials refused to return its products, **McKesson Corporation** took legal action against the Arkansas DOC seeking their return. **West-Ward Pharmaceuticals Corp.** and **Fresenius Kabi LLC**, two other companies that were affected, filed a joint amicus brief in support of **McKesson Corporation**’s suit.

A recent investigation overseen at Emory University hospital in Atlanta found that Arkansas is among a handful of states stockpiling execution drugs that are in short supply and which would otherwise be used collectively to treat more than 11,000 US patients in life-or-death procedures.<sup>22</sup> Many of the drugs used in executions are listed on the World Health Organisation’s Model List of Essential Medicines, which presents the minimum needs for a basic healthcare system, but are in dangerously short supply in the United States today.

Drug manufacturers **Fresenius Kabi LLC** and **West-Ward Pharmaceuticals Corp.** have raised concerns around the public health impact of these practices, noting that “The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”<sup>23</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Arkansas has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Arkansas officials may be continuing to knowingly and deliberately undermine the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

## Florida

Fla. Stat. Ann. § 945.10(1)(g), enacted in 2000, makes secret “[i]nformation which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.”<sup>24</sup> This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

The Florida DOC has interpreted this statute to block the release of information related to the manufacturer(s) of Florida’s lethal injection supplies. This statute has been upheld by the Florida Supreme Court in

“The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”

## Fresenius Kabi LLC and West-Ward Pharmaceuticals Corp.

several cases, with the Court summarily refusing to revisit the issue.<sup>25</sup>

FOIA response survey data reveals that the Florida DOC refuses to respond to or even acknowledge public records requests that have been submitted to it, preventing companies from monitoring the supply chain for their medicines and ensuring that the state has not violated distribution restrictions in obtaining their products.

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Affected companies oppose secrecy and the misuse of medicines in executions. These companies have sent numerous letters to the Office of Governor, Attorney General, and Head of the DOC in Florida, asking that their efforts and intentions be respected. In October of 2015, **Fresenius Kabi LLC** wrote to Governor Rick Scott in Florida seeking the return of its medicines. The company wrote, “We are asking for the return of our potassium chloride as we wish to avoid the potential harm to patients caused by shortages . . .” The distributor of the drug also reached out to Florida, seeking the return of the product

In July of 2016 and February of 2017, **Pfizer, Inc.** wrote to the Florida DOC to inform it of the inclusion of a number of products as Restricted Products in **Pfizer, Inc.’s** “Corporate Policy for Use of Our Products in Lethal Injections for Capital Punishment.” **Pfizer, Inc.** also circulated its position on the use of products in lethal injections, which states “Pfizer strongly objects to the use of its products as lethal injections for capital punishment . . . Pfizer will consistently monitor the distribution of these seven products, act upon findings that reveal noncompliance, and modify policies when necessary to remain consistent with our stated position against the improper use of our products in lethal injections.”

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Florida has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Florida officials may be knowingly and deliberately undermining the contractual restrictions that these companies have established to prevent the sale of their drugs to death rows.

### Georgia

Georgia Code § 42-5-36, passed in 2013, labels the following information as a “confidential state secret”:<sup>26</sup> “identifying information of any person or entity who participates in or administers the execution of a death sentence or manufactures, supplies, compounds, or prescribes the drugs, medical

“Pfizer strongly objects to the use of its products as lethal injections for capital punishment . . . Pfizer will consistently monitor the distribution of these seven products, act upon findings that reveal noncompliance, and modify policies when necessary to remain consistent with our stated position against the improper use of our products in lethal injections.”

### Pfizer, Inc.

supplies, or medical equipment utilized in the execution of a death sentence. ‘Identifying information’ means any records or information that reveals: name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.”

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

The companies that make the medicines listed in Georgia’s lethal injection protocol oppose secrecy and the misuse of medicines in executions. These companies have written directly to the Georgia DOC expressing this position. For example, in 2011, Georgia adopted a one-drug execution protocol using pentobarbital. However, later that year, the only licensed supplier of pentobarbital in the United States, **Lundbeck A/S**, implemented measures to ensure that its products would not be distributed to prisons for the purposes of carrying out executions, and writing to the Georgia DOC that the use of its medicines in executions “contradicts everything we are in business to do – provide therapies that improve people’s lives.”

### Indiana

In July of 2017, Indiana implemented an expansive and retroactive secrecy statute which makes secret all information relating to outsourcing facilities, wholesale drug distributors, pharmacies, and pharmacists that enter into a contract with the state to provide lethal injection substances.<sup>27</sup> This language was included in the 2017 state budget bill without opportunity for debate.

Indiana’s secrecy law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Affected companies oppose this law and the misuse of their medicines in executions more generally. In May of 2014, shortly after Indiana had acquired supplies of the pharmaceutical company **Par Pharmaceutical, Inc.’s** Brevital for use in executions, the company quickly implemented distribution controls and put out a statement, writing that “As a pharmaceutical company, Par’s mission is to help improve the quality of life. The state of Indiana’s proposed use is contrary to our mission. Par is working with its distribution partners to establish distribution controls on Brevital to preclude wholesalers from accepting orders from departments of correction.”<sup>28</sup> In an affidavit filed in Indiana court in February of 2018, professor of surgery Dr. Leonidas George Koniaris wrote that based on his research, “[a]ll of the companies approved by FDA to manufacture the drugs named in Indiana’s lethal injection protocol publicly oppose

“Use of our products to end lives contradicts everything we’re in business to do – provide therapies that help improve people’s lives.”

### Lundbeck A/S

the misuse of their medicines in lethal injections, and have entered into agreements with wholesalers to prevent the sale of their medicines to DOCs for this purpose.”<sup>29</sup>

## Idaho

In 2011, Idaho changed the language in its Administrative Code (06.01.01.135) to block the disclosure of information related to the drugs used in lethal injections in the state: “The Department will not disclose (under any circumstance) the identity of the on-site physician; or staff, contractors, consultants, or volunteers serving on escort or medical teams; nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department’s ability to carry out an execution.” This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

The companies that make the medicines listed in Idaho’s execution protocol oppose secrecy and the misuse of medicines in executions. These companies have written directly to the Idaho DOC expressing this position. For example, in 2016 and 2017, **Pfizer, Inc.** wrote to the Idaho DOC, stating “Pfizer makes its products solely to enhance and save the lives of the patients we serve ... [and] strongly objects to the use of any of our products in the lethal injection process for capital punishment.”<sup>30</sup>

## Mississippi

In 2016, Mississippi passed legislation making confidential the identities of suppliers of lethal injection chemicals located within the state. The relevant statute provides that “The identities of . . . a supplier of lethal injection chemicals . . . shall at all times remain confidential.” The law also defines “supplier of lethal injection chemicals” as a supplier located within the state of Mississippi.”<sup>31</sup> This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Citing to this law, the Mississippi DOC has declined to disclose the means through which it has procured supplies of lethal injection medicines. All of the companies that make the medicines listed in Mississippi’s execution protocol oppose the misuse of their medicines in executions and have enacted distribution controls to prevent their medicines from being purchased for this purpose.

A recent investigation overseen at Emory University hospital in Atlanta found that Mississippi is among a handful of states stockpiling execution drugs that are in short supply and which would otherwise be used collectively to treat more than 11,000 US patients in life-or-death procedures.<sup>32</sup> Many of

“Pfizer makes its products solely to enhance and save the lives of the patients we serve... [and] strongly objects to the use of any of our products in the lethal injection process for capital punishment.”

### **Pfizer, Inc.**

“The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”

### **Fresenius Kabi LLC and West-Ward Pharmaceuticals Corp.**

the drugs used in executions are listed on the World Health Organisation’s Model List of Essential Medicines, which presents the minimum needs for a basic healthcare system, but are in dangerously short supply in the United States today.

Drug manufacturers **Fresenius Kabi LLC** and **West-Ward Pharmaceuticals Corp.** have raised concerns around the public health impact of these practices, noting that “The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”<sup>33</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Mississippi has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Mississippi officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

## Missouri

In 2007, Missouri enacted Mo. Ann. Stat. § 546.720.2, which states: “The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential ... and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity...” In 2013, the state revised its protocol to include the suppliers and producers of the drugs used in lethal injection executions in its “execution team”.<sup>34</sup> This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Citing to this law, the Missouri DOC has declined to disclose critical information about the supplies of Pentobarbital used in its executions, refusing to reveal the source of its medicine or their condition and quality.

In spite of Missouri’s secrecy law, however, an investigation in March of 2018 revealed that Missouri had been procuring medicines for use in executions since 2014 from a Missouri-based pharmacy called **Foundation Care**. This pharmacy has been the subject of a series of health scandals, from engaging in hazardous pharmaceutical procedures, including a failure to properly test drugs, to attempting to block FDA agents’ access to the pharmacy for an inspection, to alleged breaches of state and federal regulations.<sup>35</sup>

**Foundation Care** has since been purchased by the healthcare company **Centene Corporation**, which opposes the misuse of medicines in

“Under Centene’s ownership, Foundation Care... will never supply any pharmaceutical product to any state for the purpose of effectuating executions.”

### **Centene Corporation**

“If your prisons have obtained the prescription drug product pentobarbital directly or indirectly, you have obtained the product in violation of our selling agreements and we ask that you contact us immediately . . . If you have any remaining pentobarbital, we ask that you return it to us.”

### **Akorn, Inc.**

“In the event that we were forced to implement additional controls to prevent these uses, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the people of Missouri.”

### **Hikma Pharmaceuticals**

executions and has vowed that it “will never supply any pharmaceutical product to any state for the purpose of effectuating executions.”

A number of other companies – including **Pfizer, Inc., Akorn, Inc. and Hikma Pharmaceuticals** – have repeatedly written to Missouri state officials informing them of the existence of these controls and seeking the immediate return of their products.

When it was reported in the news that Missouri might have obtained the pharmaceutical company **Akorn, Inc.’s** products, **Akorn, Inc.** wrote to the DOC in 2017 seeking the return of its products: “If your prisons have obtained the prescription drug product pentobarbital directly or indirectly, you have obtained the product in violation of our selling agreements and we ask that you contact us immediately . . . If you have any remaining pentobarbital, we ask that you return it to us.”<sup>36</sup> Missouri officials have ignored these requests.

In 2017, **Hikma Pharmaceuticals** also wrote to Missouri officials, stating “We object in the strongest possible terms to the use of any of our products for lethal injection.”<sup>37</sup>

**Hikma Pharmaceuticals** also raised the possibility that Missouri’s actions could have an impact on the availability of medicines for patients in Missouri: “In the event that we were forced to implement additional controls to prevent these uses, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the people of Missouri. We believe that Missourians deserve high quality, generic medicines and we are very pleased to continue to play a role in manufacturing much needed products to improve health.”

Missouri’s secret procurement of pentobarbital has attracted concern from companies’ shareholders. In a court declaration in the Eighth Circuit, the trustee of the New York State Common Retirement Fund – an investor in **Akorn, Inc.** - noted the stringent controls that **Akorn, Inc.** had enacted on its products, but expressed concern that if Missouri had violated these controls under cover of secrecy, this violation could create significant risks for **Akorn, Inc.** He wrote, “if the pentobarbital [in the possession of] the Missouri Department of Corrections is manufactured by the Company, that sale could have violated Akorn’s restrictions . . . thereby undermining the Company’s comprehensive policy that I believe manages reputational financial and legal risk.”<sup>38</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Missouri has pressed ahead in its efforts to secure these firms’ products under the

cover of a sweeping secrecy law. In doing so, Missouri officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

### **Nebraska**

Nebraska has instituted a secrecy policy in its efforts to keep the details surrounding its lethal injection drug supplies secret. This policy is currently under challenge in court through a suit brought by the American Civil Liberties Union (ACLU) of Nebraska.

Nebraska’s secrecy policy creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

In 2017, Nebraska obtained new supplies of lethal injection products that may have been procured in violation of the distribution controls implemented by affected companies. These medicines were part of Nebraska’s new execution protocol, which includes the opioid Fentanyl and Diazepam, a known drug of abuse. Citing its secrecy policy, Nebraska prison officials have withheld information on where these products originated, how they were made, and whether or not they are FDA-approved.

The companies who make the medicines in Nebraska’s protocol are all opposed to their use in executions and have put distribution restrictions in place to prevent their sale to prisons for this purpose. By seeking to procure these medicines under cover of secrecy or through illicit means, Nebraska officials may be endorsing a black market for these products, some of which may have been imported illegally.<sup>39</sup>

The companies that make the medicines in Nebraska’s protocol have sent numerous letters to the Office of Governor, Attorney General, and Head of the DOC in Nebraska, asking that their efforts and intentions be respected.

In 2017, **Pfizer, Inc.** wrote to the Nebraska DOC to seek the return of any **Pfizer, Inc.** products in the DOC’s possession. Similarly, in 2016, **Hikma Pharmaceuticals** wrote to the DOC stating that “We are extremely dismayed to learn that, despite our best efforts to ensure our medicines are used only for their intended medical purposes, some states continue to attempt to procure our products for use in lethal injections.”

Nebraska has a long history of obtaining lethal injection products fraudulently and against the wishes of manufacturers. In 2011, Nebraska tried to import sodium thiopental for use in executions through a middleman who had purchased the medicine by lying to the manufacturer of the drug, **Naari AG**, claiming that the product was intended for patient use in

“Naari did not supply these medicines directly to the Nebraska Department of Correctional Services and is deeply opposed to the use of the medicines in executions.”

### **Naari AG**

“We are extremely dismayed to learn that, despite our best efforts to ensure our medicines are used only for their intended medical purposes, some states continue to attempt to procure our products for use in lethal injections.”

### **Hikma Pharmaceuticals**

Africa.<sup>40</sup> After it came to light that **Naari AG's** products were instead sold to Nebraska for use in executions, the company issued a voluntary product recall as it was unable to guarantee the drugs' safety, potentially resulting in "serious adverse health consequences to the public if used."<sup>41</sup> In a letter to Chief Justice Heavican of the Nebraska Supreme Court in November of 2011, **Naari AG's** CEO wrote, "I am shocked and appalled by this news. Naari did not supply these medicines directly to the Nebraska Department of Correctional Services (NDOCS) and is deeply opposed to the use of the medicines in executions."

Nebraska remained undeterred, and in a lawsuit filed in 2012, a former pharmacy director for the NDOCS alleged that she had been told to obtain sodium thiopental "by any means".<sup>42</sup>

## North Carolina

In 2015, North Carolina enacted a secrecy statute that provides that a public agency is not required to disclose information that "[r]eveals [the] name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies" for lethal injection.<sup>43</sup> This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Affected companies who manufacture the drug listed in North Carolina's execution protocol oppose secrecy and the misuse of medicines in executions. For example, in 2014, one such manufacturer, **Sagent Pharmaceuticals**, announced, "In order to help ensure that patients have access to our products for use in accordance with the products' labels but to ensure our products are not used in capital punishment, Sagent is implementing appropriate distribution controls and other measures. In particular, Sagent will not accept orders from correctional facilities and prison systems for products believed to be part of certain states' lethal injection protocols. Also, each of Sagent's distributors and wholesalers will be asked to make commitments not to sell or distribute any such products to these facilities."<sup>44</sup>

"In order to help ensure that patients have access to our products for use in accordance with the products' labels but to ensure our products are not used in capital punishment, Sagent is implementing appropriate distribution controls and other measures."

## Sagent Pharmaceuticals

## Ohio

In 2015, Ohio implemented secrecy legislation (Ohio R.C. § 2949.22144F<sup>45</sup> and § 2949.222),<sup>46</sup> which makes confidential the identity of a person or company that: "manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment" used in lethal injection executions.

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

In July 2017, two pharmaceutical companies, **Fresenius Kabi USA LLC and Sandoz AG**, filed an *amici curiae* brief in support of ongoing litigation in the state of Ohio seeking the disclosure of records that the Ohio Department of Rehabilitations and Corrections (ODRC) sought to keep confidential under its secrecy statute. In filings before the court, the companies wrote that they "have a keen and important interest in knowing whether any department of corrections have obtained their drugs despite and in contravention of their distribution controls and contracts. [**Fresenius Kabi USA LLC and Sandoz AG**] have not requested to have records pertaining to them classified as confidential under R.C. 2949.221 [Ohio's secrecy statute] ... Any refusal by the state to disclose the manufacturers of its lethal injection drugs directly undermines [**Fresenius Kabi USA LLC and Sandoz AG's**] interests, impeding their ability to preserve the integrity of their contracts."<sup>47</sup>

Affected companies have also written directly to the Office of the Governor, Attorney General, and Head of the ODRC expressing this opposition to the misuse of their medicines in executions and asking that their efforts and intentions be respected. In 2017, six companies (**Pfizer Inc., West Ward Pharmaceuticals Corp., B. Braun Melsungen AG, Mylan N.V., Sandoz AG, and Sagent Pharmaceuticals**) wrote to the ODRC noting the possibility that the state may have secretly purchased quantities of its rocuronium bromide in violation of companies' contracts. **Sandoz AG** wrote, "We write to communicate in the clearest possible terms that Sandoz objects to the use of Sandoz rocuronium bromide or any other Sandoz product in the administration of capital punishment. . . . If ODRC has obtained rocuronium bromide manufactured by Sandoz with the intent to use it in executions, this is in clear breach of the contracts Sandoz has entered into with its customers."

**Sandoz AG** goes on to address the ways in which Ohio's secrecy law directly impedes the companies' business, writing, "The uncertainty

"Any refusal by the state to disclose the manufacturers of its lethal injection drugs directly undermines [the manufacturers'] interests, impeding their ability to preserve the integrity of their contracts."

## Fresenius Kabi USA LLC and Sandoz AG

"The uncertainty surrounding whether our products have been acquired by Ohio for these executions impedes our ability to enforce our company policies, protect our contractual rights, and preserve the integrity of our business relationships."

## Sandoz AG

surrounding whether our products have been acquired by Ohio for these executions impedes our ability to enforce our company policies, protect our contractual rights, and preserve the integrity of our business relationships.”

Earlier drafts of the bill that became Ohio’s secrecy statute included a clause purporting to render void “any contract, subcontract, agreement, addendum, or understanding . . . designed to prevent the state . . . from obtaining” lethal injection drugs, including contracts entered into by “foreign and domestic corporations.”<sup>48</sup>

Given the apparent unconstitutionality of this language, the legislature removed it from later drafts, but ultimately passed the Act with the stated aim of frustrating companies’ interests, “prevent[ing] and preclude[ing] foreign and domestic corporations, partnerships, companies, or persons from . . . entering into contracts designed to prevent [the ODRC] from obtaining [execution drugs].”<sup>49</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Ohio has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Ohio officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

## Pennsylvania

Pennsylvania has instituted a policy in its efforts to keep the details surrounding its lethal injection drug supplies secret. The Pennsylvania DOC cites to a confidential administrative “capital case procedures” manual to justify not revealing information relevant to companies.<sup>50</sup> Further, the state has cited Penn. Stat. § 4305(c), which renders confidential “[t]he identity of department employees, department contractors or victims who participate in the administration of an execution . . .”<sup>51</sup>

Pennsylvania’s secrecy laws and policies create a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

All of the companies that make the medicines listed in Pennsylvania’s execution protocol strongly oppose states’ use of secrecy and deception to obtain their products and have put controls in place to prevent their sale for use in executions. For example, **Pfizer, Inc.** – which manufactures Pancuronium Bromide and Potassium Chloride – has written that “Pfizer strongly objects to the use of its products as lethal injections for capital punishment . . . We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their

“Pfizer strongly objects to the use of its products as lethal injections for capital punishment... We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their lethal injection protocols.”

**Pfizer, Inc.**

lethal injection protocols.”<sup>52</sup>

## South Dakota

South Dakota expanded its secrecy law (SDCL 23A-27A-31.2)<sup>53</sup> in 2013 to make confidential information relating to suppliers of drugs for lethal injections. The language of the law states that any identifying information of “any person or entity supplying or administering the intravenous injection substance or substances” is confidential. The bill was requested and passed at the request of the Attorney General.

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

All of the companies that make the medicines listed in South Dakota’s execution protocol strongly oppose states’ use of secrecy and deception to obtain their products and have put controls in place to prevent their sale for use in executions.

For example, **Sagent Pharmaceuticals** – which manufactures Pentobarbital – has written that “in order to help ensure that patients have access to our products for use in accordance with the products’ labels but to ensure our products are not used in capital punishment, Sagent is implementing appropriate distribution controls and other measures. In particular, Sagent will not accept orders from correctional facilities and prison systems for products believed to be part of certain states’ lethal injection protocols.”

## Tennessee

Tenn. Code Ann. § 10-7-504(h)(1) & (2),<sup>54</sup> enacted in 2014, makes secret information relating to any person or entity “that has been or may in the future be directly involved in the process of executing a sentence of death.” This statute goes on to broadly define “person or entity”, stating that this term includes those “involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death.”

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

In early 2018, it came to light that the Tennessee DOC had secretly procured medicines for use in executions, likely in direct violation of contracts entered into by the drugs’ manufacturers and wholesalers.

All of the companies that make the kinds of drugs that the Tennessee DOC

“In order to help ensure that patients have access to our products for use in accordance with the products’ labels but to ensure our products are not used in capital punishment, Sagent is implementing appropriate distribution controls and other measures.”

**Sagent  
Pharmaceuticals**

“Pfizer strongly objects to the use of its products as lethal injections for capital punishment... We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their lethal injection protocols.”

### **Pfizer, Inc.**

“Lundbeck has become aware that the State of Texas has now decided to use Lundbeck’s product Nembutal (pentobarbital sodium injection, USP) for [use in executions.] Lundbeck is adamantly opposed to the use of Nembutal, or any product for that matter, for the purpose of capital punishment.”

### **Lundbeck A/S**

has stockpiled for use in upcoming executions emphatically oppose the misuse of their products in capital punishment. These include some of the world’s largest pharmaceutical firms such as **Pfizer, Inc., Johnson & Johnson, Roche Holding AG, and Akorn, Inc.**

**Pfizer, Inc.** has written that “Pfizer strongly objects to the use of its products as lethal injections for capital punishment . . . We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their lethal injection protocols.”

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Tennessee has pressed ahead in its efforts to secure these firms’ products under the cover of a sweeping secrecy law. In doing so, Tennessee officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

### **Texas**

On September 1, 2015, Texas implemented a secrecy statute (§ art. 43.14) which makes confidential information related to its drug suppliers.<sup>55</sup> Specifically, the statute makes secret any identifying information related to “any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies” for lethal injection. This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

In 2013, it came to light that the Texas Department of Criminal Justice (TDCJ) has used deception to purchase compounded medicines for use in executions from a business in Texas.

TDCJ ordered compounded pentobarbital from the company under the name “Huntsville Unit Hospital”, misleading it about the intended purpose of the drug.<sup>56</sup> The state also wrote out a false prescription for the drug made in the name of the warden of the Huntsville Unit.

A number of other affected companies oppose secrecy and the misuse of medicines in executions and have written directly to the Office of the Governor, Attorney General, and the TDCJ expressing this position.

In March of 2011, the company **Lundbeck A/S** wrote to the director of TDCJ to inform the state that “Lundbeck has become aware that the State of Texas has now decided to use Lundbeck’s product Nembutal (pentobarbital sodium injection, USP) for [use in executions.] Lundbeck is adamantly opposed to the use of Nembutal, or any product for that

matter, for the purpose of capital punishment.”<sup>57</sup> Since that time, TDCJ has received multiple letters from pharmaceutical companies including **Hospira, Fresenius Kabi LLC, and Pfizer, Inc.**

### **Virginia**

Virginia law makes confidential “[t]he identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection” as well as officers and employees of the pharmacy or outsourcing facility and any other supporting person or entity.<sup>58</sup>

The law also exempts the pharmacy supplying its execution drugs from “the jurisdiction of the Board of Pharmacy, Board of Medicine or the Department of Health Professionals,” specifically stating that the supply of drugs for executions “shall not constitute the practice of pharmacy... is not subject to the jurisdiction of the Board of Pharmacy, the Board of Medicine, or the Department of Health Professions...(and) is exempt from the provisions of Chapter 33 (§ 54.1-3300 et seq.) of Title 54.1 and the Drug Control Act”.

This law was enacted in 2016, despite warnings from Republican lawmakers like Delegate David B. Albo that “If this all remains secret, then there’s no way to make sure people are following the law.”<sup>59</sup>

Virginia’s secrecy law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

Healthcare companies including **Pfizer, Inc., Mylan N.V., and Sagent Pharmaceuticals** have written to the DOC protesting the state’s efforts to source their medicines in secret. The pharmaceutical manufacturer **Hikma Pharmaceuticals/West-Ward Pharmaceuticals Corp.** wrote that it was “extremely dismayed” at the state’s continued efforts to circumvent its contracts “despite our best efforts to ensure our medicines are used only for their intended medical purposes”.<sup>60</sup>

In 2016, the Vice President of Business Strategies for **X-GEN Pharmaceuticals, Inc.** told the Associated Press he was surprised and concerned to learn that the company’s rocuronium bromide had been resold to Virginia’s prison system. He said **X-GEN Pharmaceuticals, Inc.** had put controls in place to prevent its products from being used in executions.<sup>61</sup>

A recent investigation overseen at Emory University hospital in Atlanta found that Virginia is among a handful of states stockpiling execution drugs that are in short supply and which would otherwise be used collectively to

“We are extremely dismayed to learn that, despite our best efforts to ensure our medicines are used only for their intended medical purposes, some states continue to attempt to procure our products for use in lethal injections.”

### **Hikma Pharmaceuticals**

treat more than 11,000 US patients in life-or-death procedures.<sup>62</sup> Many of the drugs used in executions are listed on the World Health Organisation’s Model List of Essential Medicines, which presents the minimum needs for a basic healthcare system, but are in dangerously short supply in the United States today. Drug manufacturers **Fresenius Kabi LLC** and **West-Ward Pharmaceuticals Corp.** have raised concerns around the public health impact of these practices, noting that “The use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”<sup>63</sup>

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Virginia has pressed ahead in recent years in purchasing drugs in illicit markets through the use of secrecy laws.

## Wyoming

Wyo. Stat. § 7-13-916, enacted in 2015, makes confidential “[t]he identities of all persons who participate in the execution of a death sentence . . . by supplying or manufacturing the equipment and substances used for the execution . . . Disclosure of the identities made confidential by this section may not be authorized or ordered. Records containing information made confidential by this section shall be redacted to exclude all confidential information and nothing in this section shall be used to limit or deny access to otherwise public information.”

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and ensure that distribution restrictions are working effectively.

All of the companies that make the medicines in Wyoming’s execution protocol strongly oppose states’ use of secrecy and deception to obtain their products and have put controls in place to prevent their sale for use in executions. For example, **Pfizer, Inc.** – which manufactures Pancuronium Bromide and Potassium Chloride – has written that “Pfizer strongly objects to the use of its products as lethal injections for capital punishment . . . We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their lethal injection protocols.”

“Pfizer strongly objects to the use of its products as lethal injections for capital punishment... We are enforcing a distribution restriction for specific products that have been part of, or considered by some states for their lethal injection protocols.”

## Pfizer, Inc.

## Medium Risk States

*The following thirteen states have not enacted secrecy legislation or policies, but are known to be actively attempting to violate companies' distribution controls. These states have been designated 'medium risk'.*

### **California**

California does not have a formal secrecy law in place. However, the California Department of Corrections and Rehabilitation (CDCR) has recently authorized the use of a protocol that could see companies' products used against their wishes and purchased in violation of companies' distribution controls.

Affected companies oppose secrecy and the misuse of medicines in executions. These companies have sent numerous letters to the Office of the Governor, Attorney General, and Head of the CDCR in California, asking that their efforts and intentions be respected.

### **Colorado**

There is no language included in Colorado law making confidential information relating to the manufacturer or supplier of drugs.

However, Colorado law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies' distribution controls.

### **Kansas**

There is no secrecy statute relating to drug suppliers in Kansas. The law makes confidential only "the identity of executioners and other persons designated to assist in carrying out the sentence of death."<sup>65</sup>

However, Kansas law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies' distribution controls.

### **Kentucky**

Kentucky has not implemented a secrecy statute that specifically applies to or impacts companies. Rather, it has implemented a more narrow statute that makes confidential the identity of "an individual performing the services of executioner."<sup>66</sup>

Kentucky law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies' distribution controls.

Affected companies oppose secrecy and the misuse of medicines in executions. These companies have sent numerous letters to the Offices of the Governor, Attorney General, and Head of the DOC in Kentucky asking

"Sagent does not approve of any 'off-label' use of its products, and specifically objects to any use of its drug products in connection with capital punishment activities, including lethal injection, by your department or by any government entity."<sup>64</sup>

### **Sagent Pharmaceuticals**

that their efforts and intentions be respected.

For example, in 2015 **Akorn, Inc.** wrote to the Kentucky DOC to note that the use of medicines in lethal injection executions “is contrary to Akorn’s commitment to promote the health and wellness of human patients,” and that “Akorn strongly objects to the use of its products in capital punishment.”<sup>67</sup>

## Louisiana

Louisiana does not have a secrecy statute; however, it has implemented a law making confidential the individuals who “participate or perform ancillary functions in an execution of the death sentence.”<sup>68</sup> Although this law does not specifically relate to companies it is possible that the Louisiana DOC will attempt to expand this law to apply to or impact companies in the future.

Louisiana law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Montana

Montana does not have a secrecy statute that specifically applies to or impacts companies. Rather, it has a statute that makes confidential “[t]he identity of the executioner” and “[f]acts pertaining to the selection and training of the executioner.”<sup>69</sup>

However, Montana law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Nevada

Nevada does not currently have a secrecy statute. However, the DOC does maintain a “confidential execution manual,” which has only been made public twice in 2006 and 2017 after information was redacted about “internal institutional and operational security.”<sup>70</sup> The release of the redacted confidential manual in 2006 only came after the department was threatened with a lawsuit for refusing to comply with a public records request.<sup>71</sup>

Nevada has recently authorized the use of a new protocol that could see companies’ products used against their wishes and purchased in violation of companies’ distribution controls. This protocol includes the use of the opioid fentanyl, as well as diazepam, a known drug of abuse.

The companies who make the medicines in Nevada’s protocol are all opposed to their use in executions and have put distribution restrictions

“Akorn strongly objects to the use of its products in capital punishment.”

**Akorn, Inc.**

in place to prevent their sale to prisons for this purpose. By seeking to procure these medicines under cover of secrecy or through illicit means, Nevada officials may be endorsing a black market for these products, some of which may have been imported illegally.<sup>72</sup>

Affected companies oppose secrecy and the misuse of medicines in executions. These companies have sent numerous letters to the Office of the Governor, Attorney General, and Head of the DOC in Nevada, asking that their efforts and intentions be respected.

For example, in 2017 **Pfizer, Inc.** wrote to the Nevada DOC seeking the return of any **Pfizer, Inc.** products in the DOC’s possession. Similarly, in 2017 **West-Ward Pharmaceuticals Corp.** wrote to the state to note that they “object in the strongest possible terms to the use of any of our products for lethal injection. Such use is not only contrary to the intended label use for the Products but also inconsistent with our values and mission of improving lives by providing quality, affordable healthcare.”<sup>72</sup>

## New Hampshire

There is no secrecy statute relating to drug suppliers in New Hampshire.

However, New Hampshire law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Oklahoma

In 2011, Oklahoma passed OK Stat. § 22-1015(B), which makes confidential the identity of all persons who supply drugs, medical supplies, or equipment for use in executions.

However, in March of 2018, Oklahoma became the first state to categorically reject the lethal injection as a method of execution.<sup>73</sup> In abandoning the method, state officials noted that they were unable to procure medicines for use in executions legally given the controls that manufacturers have put in place, and did not want to buy drugs from “seedy individuals” on “back streets” in order to continue to use it.

State officials also referred to problems with lethal injections in other states such as Ohio and Alabama, where inmates had been “poked and prodded” for hours in prolonged executions that Oklahoma officials described as “inhumane.”<sup>74</sup>

By renouncing all efforts to secure companies’ products, Oklahoma presents a significantly lower risk to companies than other states which have enacted secrecy laws.

“I got to the point... that I was calling all around the world, to the backstreets of the Indian subcontinent to try procure drugs... Trying to find alternative compounds or someone with prescribing authority willing to provide us with the drugs is becoming exceedingly difficult, and we will not attempt to obtain the drugs illegally.”

**Joe Allbaugh,  
Director of the  
Oklahoma DOC**

“We object in the strongest possible terms to the use of any of our products for lethal injection. Such use is not only contrary to the intended label use for the Products but also inconsistent with our values and mission of improving lives by providing quality, affordable healthcare.”

**West-Ward  
Pharmaceuticals**

## Oregon

Oregon does not have a secrecy statute or regulation in place that specifically applies to or impacts companies.

However, the state has an administrative rule that provides that “executions will be conducted in a manner designed to make confidential the identity of Department staff and other persons involved [in an execution].”<sup>75</sup> The state may attempt to use this rule in the future to negatively impede companies in their efforts to monitor the supply chain.

Oregon law authorizes the use of medicines in lethal injection executions and the state DOC may be attempting to obtain execution drugs in violation of companies’ distribution controls.

## South Carolina

South Carolina has not implemented a secrecy provision related to the suppliers of its drug products. However, the South Carolina Attorney General’s Office has issued an opinion stating that existing statutory language should be broadly interpreted, allowing legal authority to deny making transparent such information.<sup>76</sup>

South Carolina law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Utah

Utah does not have a secrecy provision in its statutes or administrative regulations and at present is not actively seeking to violate companies’ distribution controls. However, current Utah legislation<sup>77</sup> authorizing the use of lethal injection may lead state officials to attempt to do so in the future.

Utah law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Washington

The state of Washington does not have a secrecy provision in its statutes or administrative regulations and at present is not actively seeking to violate companies’ distribution controls.

However, Washington law authorizes the use of medicines in lethal injection executions and the state DOC is actively attempting to obtain execution drugs in violation of companies’ distribution controls.

## Low Risk States

*The following nineteen states and the District of Columbia do not currently pose significant risks to companies. These states have not adopted secrecy legislation and show no intention to breach or otherwise circumvent company contracts and agreements. These states have been designated 'low risk'.*

### **Alaska**

Alaska has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Connecticut**

Connecticut has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Delaware**

Delaware has no secrecy statute or policy in place. Although the Delaware DOC has attempted unsuccessfully to withhold information, the Delaware Attorney General's office has on at least two occasions ordered the DOC to provide records related to the source of its lethal injection drug products.<sup>78</sup>

### **District of Columbia**

The District of Columbia has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Hawaii**

Hawaii has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Illinois**

Illinois has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Iowa**

Iowa has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

### **Maine**

Maine has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Maryland**

Maryland has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Massachusetts**

Massachusetts has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Michigan**

Michigan has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Minnesota**

Minnesota has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **New Jersey**

New Jersey has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **New Mexico**

New Mexico has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **New York**

New York has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **North Dakota**

North Dakota has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Rhode Island**

Rhode Island has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Vermont**

Vermont has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **West Virginia**

West Virginia has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## **Wisconsin**

Wisconsin has no secrecy statute or policy in place and does not appear likely to circumvent company contracts and agreements in the future.

## References

- 1** These laws and policies have been framed as initiatives intended “to prevent and preclude foreign and domestic corporations, partnerships, companies, or persons from . . . entering into contracts designed to prevent [the DOC] from obtaining [execution drugs].” See, e.g., H.B. No. 663, 130th Gen. Assemb., Reg. Sess. (Oh. 2013-2014).
- 2** *Family Sues in Protracted Ohio Execution*, N.Y. TIMES, Jan. 25, 2014, <https://www.nytimes.com/2014/01/26/us/family-sues-in-protracted-ohio-execution.html>.
- 3** Ed Pilkington, *Botched Oklahoma Execution Turns Spotlight on US Pharmaceutical Firms*, GUARDIAN, May 1, 2014, <https://www.theguardian.com/world/2014/may/01/oklahoma-execution-drugs-pharmaceutical-companies-shortage>; Ed Pilkington, Jon Swaine, and Katie Fretland, *Botched Oklahoma Execution ‘Fell Short of Humane Standards’ - White House*, GUARDIAN, Apr. 30, 2014, <https://www.theguardian.com/world/2014/apr/30/oklahoma-clayton-lockett-botched-execution-explanation>.
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*Published July 2018*

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