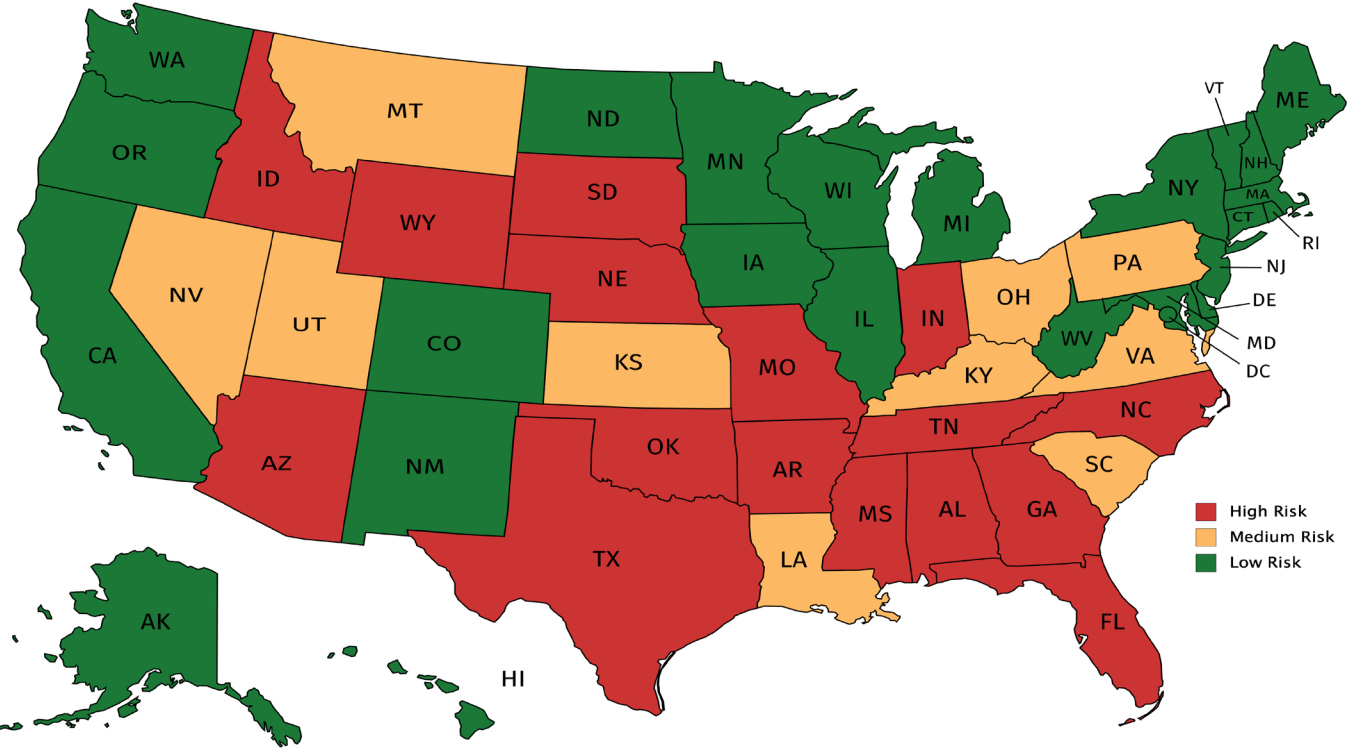


Respecting Corporate Contracts: **State-by-State Risk Index**

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

Second Edition
November 2020

Fig. 1. Ratings on Levels of Risk



Respecting Corporate Contracts: State-by-State Risk Index

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

Second Edition
November 2020

This State-by-State Risk Index serves as a guide for companies concerned about execution secrecy laws and the implications for commercial enterprises and public health.

The Index contains individualized risk profiles for every state in the United States, the District of Columbia, and the federal government and assigns a risk evaluation (“high,” “medium,” or “low”) based on legislation, policies, and practices in this area.

Companies looking to expand their businesses in the US are advised to consult the risk profiles in this Index before investing. Companies should engage with 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
Federal Government
Florida
Georgia
Idaho
Indiana
Mississippi
Missouri
Nebraska
North Carolina
Oklahoma
South Dakota
Tennessee
Texas
Wyoming

Medium Risk

Kansas
Kentucky
Louisiana
Montana
Nevada
Ohio
Pennsylvania
South Carolina
Utah
Virginia

Low Risk

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

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Introduction

Over the last twenty years, nineteen states and the federal government have implemented legislation or policies on information related to executions – commonly referred to as secrecy laws – that undermine the interests of actors in the pharmaceutical industry and create risks for public health.

Faced with opposition by pharmaceutical companies to the misuse of their medicines in executions, state officials have used secrecy laws in efforts to bypass controls put in place by companies to protect medicines from diversion.¹

The medicines in question include the highly dangerous drug of abuse, fentanyl, along with other opioids and Schedule II controlled substances.

These laws and policies have serious implications for businesses, exposing companies to legal,² reputational,³ and fiscal risks.⁴ As two global companies challenging these practices expressed in legal filings in July 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.”⁵

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 diversions could “place patients . . . across the country at risk.”⁶

Under some secrecy laws, pharmaceutical companies seeking to identify whether their medicines were purchased in violation of their contracts could be subjected to criminal and civil sanctions. Companies have an interest in and duty to track the movement of their drugs throughout the supply chain and to enforce their contractual controls. These laws risk penalizing companies for doing so.

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”⁷ considering investment in such states.

At present, state secrecy laws mainly affect 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 emphasized 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 divestment.

Reputational risks

When companies’ medicines are misused 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 misused in executions. Family members of Dennis McGuire sued two major pharmaceutical companies — one manufacturer and one wholesaler — 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

Note on Second Edition

In the two years since this Index was first published in the summer of 2018, there have been significant developments in the secrecy law landscape. 2020, for example, saw the first-ever legislative repeal of a secrecy law in Virginia. In a triumph for transparency, public health, and economic freedom, Virginia law now expressly holds that information related to the suppliers of medicines intended for use in executions is subject to the state's public records law.

The second edition incorporates several changes in categorizations and, for the first time, adds a risk profile for the federal government. Overall, the number of states categorized as high and medium risk has decreased.

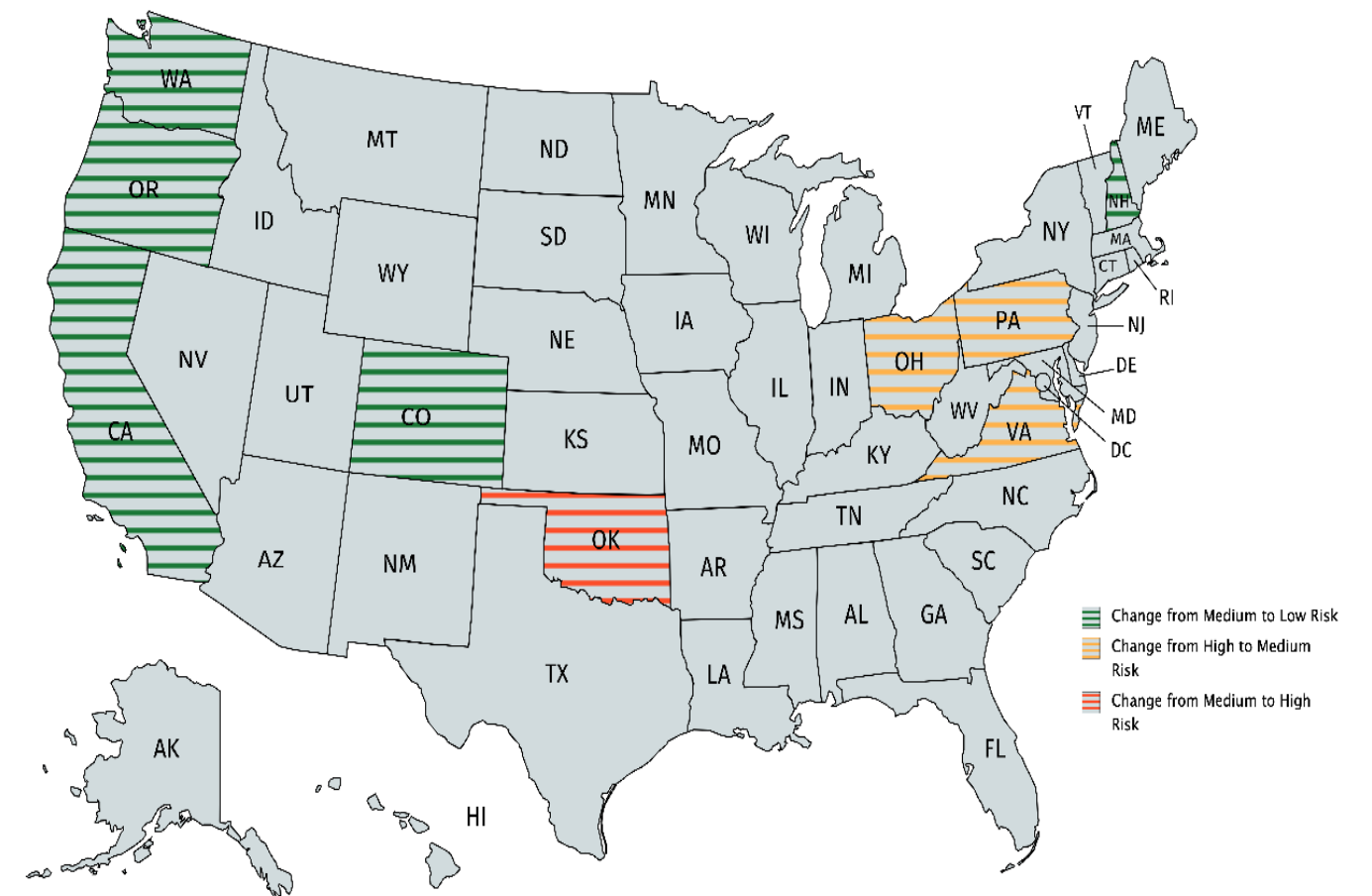
High Risk: The number of states in the high-risk category has decreased from 18 to 16, and with the addition of the federal government, the current total is 17.

Medium Risk: The number of states in the medium-risk category has decreased from 13 to 10.

Low Risk: The number of states in the low-risk category has increased from 20 to 25.

The categorizations for nine states have changed since 2018. Figure 2 on the following page depicts those changes. California, Colorado, New Hampshire, Oregon, and Washington have changed from medium to low risk. Ohio, Pennsylvania, and Virginia have changed from high to medium risk. And Oklahoma has changed from medium to high risk.

Fig. 2. Changes in Second Edition



Overview

High Risk

Sixteen states and the federal government 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.**”

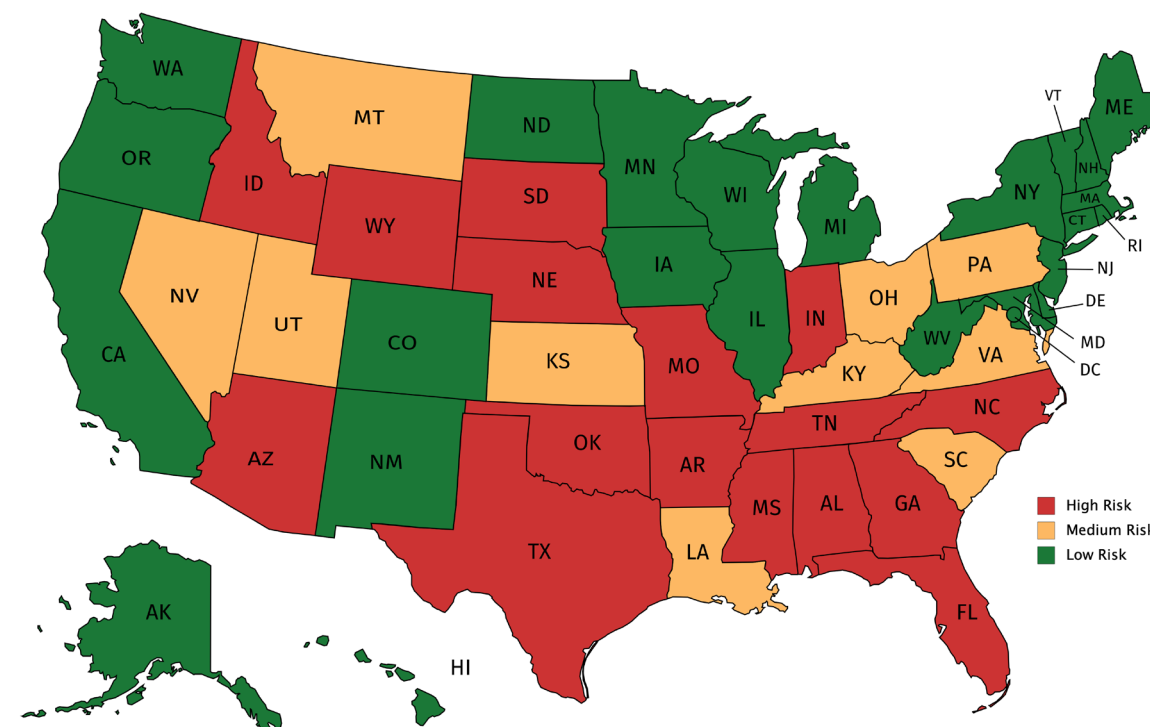
Medium Risk

Ten 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

Twenty-four 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.**”

Fig. 1. Ratings on Levels of Risk



High Risk

Alabama
Arizona
Arkansas
Federal Government
Florida
Georgia
Idaho
Indiana
Mississippi
Missouri
Nebraska
North Carolina
Oklahoma
South Dakota
Tennessee
Texas
Wyoming

Medium Risk

Kansas
Kentucky
Louisiana
Montana
Nevada
Ohio
Pennsylvania
South Carolina
Utah
Virginia

Low Risk

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

Arkansas

Case Study 1

In early 2017, Arkansas announced a plan to carry out eight executions in ten days, the largest mass execution in over half a century.

All three of the drugs that Arkansas intended to use in the executions had been procured by the Department of Corrections (DOC) in breach of company control systems. Court transcripts also suggested that the state Attorney General had knowingly induced the state's supplier to violate contracts with pharmaceutical manufacturers.⁸

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 the companies whether and how it had obtained their products, citing its secrecy law.

Healthcare firm **McKesson Corporation** conducted a detailed review and discovered that state officials had obtained **Pfizer Inc.** medicines through "*false pretense, trickery, and bad faith*."⁹ 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 suit against the Arkansas DOC in April of 2017, causing a temporary stay of seven executions.¹⁰

Two additional companies, British **West-Ward Pharmaceuticals Corp.** and German **Fresenius Kabi LLC**, were similarly affected by the control system breaches induced by Arkansas officials and filed an amicus brief in the suit, noting the serious public health risks associated with secrecy and product diversion.¹¹

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

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

Virginia

Case Study 2

In 2020, Virginia became the first state in the country to abandon its dangerous experiment with execution secrecy through a legislative repeal. Senate Bill 270, adopted by Governor Ralph Northam on April 11, 2020, rejected the policy of acquiring drugs for executions under a veil of secrecy.¹²

Virginia adopted its now-repealed secrecy law in 2016. The secrecy bill garnered substantial opposition. One Republican House Delegate pointed out that the public "would be more certain about the chemical composition of the asphalt that [the Virginia Department of Transportation] buys to put on our roads than we would about the drugs we put in the veins of someone we want to execute."¹³ The bill nonetheless passed by a narrow margin.

Not only did the law make information concerning drug supplies confidential, but it also exempted the source of drugs intended for use in executions from regulations designed to protect public health. The law exempted the compounding of drugs for use in lethal injections from regulations on the practice of pharmacy and Virginia's Drug Control Act.¹⁴

Since 2016, state legislators and officials have advocated for a repeal of the secrecy law on transparency, safety, and public health grounds. Senator John Bell, the sponsor of the repeal bill, explained that the cloak of secrecy could permit the diversion of drugs intended for use in executions from the correctional system to the wider patient market.¹⁵ And in remarks in 2017, then-Lieutenant Governor Northam pointed out that "pharmaceutical companies, the majority of them, have said we don't want the medications that we manufacture used to put people to death" and called for the state to reconsider its position on secrecy.¹⁶

The repeal bill passed the House and the Senate in February and March and Governor Northam approved the bill in April. As of the law's effective date of July 1, 2020, the identities of Virginia's suppliers of drugs for use in lethal injections are now expressly subject to the Virginia Freedom of Information Act.¹⁷

"We need to look at legislation to make sure that if the law of the land is the death penalty, that we do it humanely and fairly and not in secret with compound medications that sometimes work and sometimes don't work."

**Virginia
Lieutenant
Governor
(now Governor)
Ralph Northam**

Methodology

This Index surveys the laws, policies, and practices of all 50 US states, the District of Columbia, and the federal government. 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 related 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 company controls were designated “low risk.”

This data was derived from an analysis of statutes, regulations, judicial opinions, 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.

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 sixteen states and the federal government 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, and despite the lack of a formal secrecy law, the Alabama DOC has maintained 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.¹⁸ Alabama's secrecy policy is one of the strictest in the US, making all documents associated with an execution confidential,¹⁹ 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 to ensure that their 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 the Governor, the Attorney General, and the 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 Akorn products against Akorn's 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."²⁰

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 secrecy. In so doing, 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's secrecy law has been effective since 2008. Arizona Revised Statutes § 13-757 makes the identity of "persons who participate or perform ancillary functions in an execution" confidential.²¹ The Arizona DOC has interpreted this provision to apply to all information related to the suppliers and manufacturers of drugs intended for use in executions, 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 to ensure that their 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. 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.”²²

An investigation overseen at Emory University hospital in Atlanta found that Arizona was 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.²³ 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 “[t]he use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”²⁴

Arkansas

Arkansas Code § 5-4-617 specifies that “[d]ocuments, records, or information that may identify or reasonably lead directly or indirectly to the identification of an entity or person who compounds, synthesizes, tests, sells, or supplies, manufactures, transports, procures, dispenses, or prescribes” the drug(s), medical supplies, or medical equipment to be used in executions are to remain confidential.²⁵ “A person who recklessly discloses” confidential information under the statute “is guilty of a Class D felony,”²⁶ punishable by up to six years imprisonment.²⁷

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

Although Arkansas’ statute previously permitted certain information related to the manufacturers of its drug supplies be released in redacted form,²⁸ in practice, the DOC refused to disclose redacted package inserts and

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

Lundbeck A/S

labels. In 2017, a circuit judge ordered the DOC to disclose these records after the DOC improperly refused to do so, and the Arkansas Supreme Court upheld the decision.²⁹ In 2019, the Arkansas legislature amended the secrecy law to prohibit even this limited disclosure of information related to drug supplies.³⁰

In April 2017, reports indicated that 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 the companies whether and how it had obtained their products, citing 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, also filed a joint amicus brief in the suit.

An investigation overseen at Emory University hospital in Atlanta found that Arkansas was 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.³¹ 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 “[t]he use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”³²

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 so doing, 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.

“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.**

Federal Government

Congress has not enacted secrecy legislation directly addressing the confidentiality of the identities of entities or persons involved in the manufacture or supply of drugs intended for use in lethal injections. Nonetheless, since the Department of Justice's (DOJ) July 2019 announcement of its plans to resume lethal injection executions for the first time in more than fifteen years, DOJ has implemented a de facto secrecy policy. This secrecy policy has been revealed in ongoing litigation challenging the federal execution protocol, investigative reports, and responses to congressional inquiries.

When a group of death row inmates challenged DOJ's adoption of a new execution protocol, DOJ was required to produce a record of the materials it consulted and relied on in developing the protocol. In producing that "administrative record," however, DOJ refused to disclose information related to persons or entities involved in manufacturing, supplying, compounding, or testing the drugs acquired for use in executions. Instead, DOJ redacted that information from relevant records in its public filings, leaving the inmates and the public in the dark on critical issues concerning the drug supply.³³

Investigations into the federal government's pursuit of drugs for use in executions likewise indicate that it used the cover of secrecy to sidestep company interests. One journalist described DOJ's process as "a three-year campaign to line up a secret supply chain" and reported that secrecy permitted DOJ to obtain tests from a laboratory that had a specific policy against testing drugs intended for use in lethal injections.³⁴ After learning that it had unintentionally tested drugs for use in executions, that company took measures to combat secrecy by announcing it would require clients to disclose the intended use of medicines submitted for testing.³⁵

DOJ's de facto secrecy policy is not just limited to the public and potentially affected companies. DOJ has also refused to disclose relevant information to Congress. As part of an investigation into the decision to resume executions, the Subcommittee on Civil Rights and Civil Liberties of the House Committee on Oversight and Reform requested information from DOJ related to the supplies of the drugs it acquired for use in executions. DOJ, however, "refused to produce the requested documents."³⁶

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

"It has been, and will always be, our policy to not knowingly test a medication that will be used for [lethal injections]. . . . It will be our policy going forward to require a statement from our client indicating their preparation will not be used for execution. Clients that decline to make that declaration will not be allowed to submit their pentobarbital to DYNALABS for testing."

DYNALABS LLC

Florida

Florida Statutes § 945.10, originally enacted in 2000, makes "[i]nformation which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection" secret.³⁷ Another provision of that section makes "information which if released would jeopardize a person's safety" confidential.³⁸

The Florida DOC has interpreted this statute to bar the release of any information related to the manufacturer(s) of medicines Florida acquires for use in lethal injections. And while the scope of the secrecy law has not been decided by a court, the Florida Supreme Court has held it is constitutional in several cases.³⁹

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and to ensure that their 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 the Governor, the Attorney General, and the Head of the DOC, asking that their efforts and intentions be respected. In October 2015, **Fresenius Kabi LLC** wrote to Florida Governor Rick Scott seeking the return of its medicines. The company wrote, "[w]e 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 2016 and February 2017, **Pfizer, Inc.** wrote to the Florida DOC to inform it of the restriction of a number of Pfizer products in its "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."

Amidst the 2020 COVID-19 pandemic, several leading medical and public health professionals wrote to state DOCs, including Florida's, to ask for the release of drugs stockpiled for lethal injection. While acknowledging many states hide information on their drug supplies through secrecy laws, the authors gleaned through the limited information publicly available that the drugs in Florida's stockpile — likely obtained in violation of company controls — could be used to treat at least 100 COVID-19 patients.⁴⁰

"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.

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 so doing, 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": "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 supplies, or medical equipment utilized in the execution of a death sentence." Identifying information is broadly defined as "any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications."⁴¹

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and to ensure that their 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 wrote 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."

Idaho

In 2011, Idaho modified its Administrative Code to block the disclosure of information related to the drugs used in lethal injections in the state. Pursuant to Section 06.01.01.135, the DOC "will not disclose under any circumstance information wherein the director determines disclosure of such information could jeopardize the Department's ability to carry out an execution, including . . . [i]nformation that identifies or could lead to the identification of any pharmacy, prescriber, manufacturer, compounder, or other entity that supplies or has supplied any chemicals or substances to the Department of Correction or any entity that provides or has provided medical supplies or services to the Department of Correction."⁴²

"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

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and to ensure that their 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."⁴³

Indiana

In July 2017, Indiana implemented an expansive and retroactive secrecy statute. Indiana Code § 35-38-6-1 makes "[t]he identity of a person" that enters into a contract for "the issuance or compounding of" drugs for use in lethal injections, as well as "[i]nformation reasonably calculated to lead to the identity of" such a person confidential.⁴⁴ This language was included in the 2017 state budget bill without opportunity for debate. Indiana's law further limits scrutiny of the supply chains for drugs intended for use in lethal injections by exempting suppliers from pharmacy and health laws.⁴⁵

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

Affected companies oppose this law and the misuse of their medicines in executions. In May 2014, shortly after Indiana had acquired supplies of **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."⁴⁶ In an affidavit filed in Indiana court in February 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 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."⁴⁷

Mississippi

In 2016, Mississippi passed legislation making the identities of suppliers located within the state of chemicals to be used in lethal injections

"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.

confidential. Mississippi Code § 99-19-51 provides that “[t]he identities of . . . a supplier of lethal injection chemicals . . . shall at all times remain confidential.” The law defines “supplier of lethal injection chemicals” as a supplier “located within the state of Mississippi.”⁴⁸

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

Citing this law, the Mississippi DOC has declined to disclose the means through which it has procured supplies of medicines intended for use in lethal injections. 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.

An investigation overseen at Emory University hospital in Atlanta found that Mississippi was 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.⁴⁹ 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 “[T]he use of the medicines for lethal injections creates a public-health risk by undermining the safety and supply of lifesaving medicines.”⁵⁰

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 so doing, 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 Missouri Statutes § 546.720, 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 . . .”⁵¹ In 2013, the state revised its execution protocol to include the suppliers and producers of the

“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.**

drugs used in lethal injection executions in its “execution team.”⁵² Under the law, persons that knowingly disclose the identity of a supplier of drugs for use in lethal injections or a record that could identify such a person are subject to civil liability for actual and potentially punitive damages.⁵³

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

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

In spite of Missouri’s secrecy law, an investigation in March 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.⁵⁴

Foundation Care has since been purchased by the healthcare company **Centene Corporation**, which opposes the misuse of medicines in 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 their controls and seeking the immediate return of their products.

When journalists reported 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, stating: “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.”⁵⁵ Missouri officials ignored this request.

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.”⁵⁶

Hikma Pharmaceuticals also raised the possibility that Missouri’s

“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

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.** — expressed concern that if Missouri violated the stringent controls **Akorn, Inc.** had enacted to protect its products, the violation could create significant risks for the company. 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.”⁵⁷

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 so doing, 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

Enacted in 2009, Nebraska Revised Statutes § 83-967 makes “[t]he identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members” confidential.⁵⁸ The Nebraska Department of Correctional Services (DCS) has interpreted this provision broadly, arguing that revealing the identity of a supplier of drugs intended for use in executions could lead to the disclosure of information concerning a member of the execution team.⁵⁹

In 2020, the Nebraska Supreme Court rejected the DCS’s argument in lawsuits brought by the ACLU of Nebraska and several media organizations. The court found that the DCS offered only “conclusory allegations” that disclosing the supplier of medicines could identify a member of the execution team.⁶⁰ The ruling forced the DCS to release the records, revealing that the DCS obtained drugs manufactured by **Fresenius Kabi LLC**, **Hikma Pharmaceuticals**, **Teva Pharmaceutical Industries**, and

Pfizer, Inc. Each of these companies opposes the misuse of its medicines in executions and has implemented distribution controls to prevent sales to states for this purpose.⁶¹

The records revealed information about Nebraska’s 2017 procurement of drugs for use in implementing a new and untested execution protocol. The protocol includes the opioid fentanyl, a known drug of abuse. While the records have since been disclosed, Nebraska utilized its secrecy law to hide information on where these products originated, how they were made, and whether or not they were FDA-approved for three years.

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.⁶²

The companies whose drugs the DCS secretly obtained have sent numerous letters to the Office of the Governor, the Attorney General, and the Head of the DCS, asking that their efforts and intentions be respected. In 2017, **Pfizer, Inc.** wrote to the Nebraska DCS to seek the return of any **Pfizer, Inc.** products in the DCS’s possession. Similarly, in 2016, **Hikma Pharmaceuticals** wrote to the DCS 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.”

In 2018, **Fresenius Kabi USA LLC** filed suit against the Nebraska DCS when it suspected the state obtained its drugs in violation of its distribution controls. The lawsuit alleged that the Nebraska DCS must have obtained its medicines “in contradiction and contravention of the distribution contracts the Company has put in place and therefore through improper or illegal means.”⁶³

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 Africa.⁶⁴ 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.⁶⁵ 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

“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

“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

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 DCS alleged that she had been told to obtain sodium thiopental “by any means.”⁶⁶

While Nebraska’s interpretation of its secrecy statute was rejected by the courts, it is likely that the state will continue to attempt to procure drugs in violation of company controls and avoid disclosure of information about its efforts. This practice will create a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines and to ensure that their distribution restrictions are working effectively.

North Carolina

North Carolina General Statutes § 132-1.2, enacted in 2015, exempts records that “[r]eveal[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 from public disclosure.⁶⁷

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

Affected companies that manufacture Pentobarbital, the drug listed in North Carolina’s execution protocol, oppose secrecy and the misuse of medicines in executions. For example, in 2014 **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.”⁶⁸

Oklahoma

Oklahoma Statutes § 22-1015, enacted in 2011, makes the identity of all persons who supply drugs, medical supplies, or equipment for use in executions confidential.⁶⁹ The statute also exempts state purchases of drugs for use in lethal injection from the state’s purchasing transparency act.

“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**

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

In February of 2020, Oklahoma announced that it intends to resume executions by lethal injection and that it had found a supply of drugs to do so.⁷⁰

The companies that manufacture the drugs in Oklahoma’s execution 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. Affected companies have repeatedly expressed this position in communications to the state. In March 2015, for example, **Akorn, Inc.** wrote to the Oklahoma Attorney General noting that it “strongly objects to the use of its products in capital punishment” and describing the controls it had put in place to prevent the sale of midazolam to state departments of corrections for use in executions.⁷¹

The February 2020 announcement came after Oklahoma became the first state to categorically reject lethal injection as a method of execution in 2018.⁷² 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.” 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.”⁷³

Given the state’s prior recognition that it could not legally procure medicines for use in executions due to company controls, the recent announcement raises significant concerns that state officials may have knowingly and deliberately undermined the contractual restrictions that companies have established to prevent the sale of their drugs to death rows under the cover of secrecy.

South Dakota

The South Dakota legislature expanded Section 23A-27A-31.2 of the Codified Laws in 2013 to make “the name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying” drugs intended for use in executions confidential.⁷⁴ The legislature passed the amendment 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 to ensure that their distribution restrictions are working effectively.

“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**

“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.

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

Tennessee Code § 10-7-504, enacted in 2013, makes 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” confidential. This includes those “involved in the procurement or provision of chemicals, equipment, supplies, and other items for use in” executions.⁷⁵

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

In early 2018, evidence emerged 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 drugs in Tennessee’s execution protocol 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 so doing, 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

Section 43.14 of the Texas Code of Criminal Procedure, implemented on September 1, 2015, makes “[t]he name, address, and other identifying information” of “any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution” confidential.⁷⁶

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

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

TDCJ ordered compounded pentobarbital from the company under the name “Huntsville Unit Hospital,” misleading it about the intended use of the drug.⁷⁷ The state also wrote out a false prescription for the drug made in the name of the warden of the Huntsville Unit.

Affected companies oppose secrecy and the misuse of medicines in executions and have written directly to the Office of the Governor, the Attorney General, and 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.”⁷⁸ Since that time, TDCJ has received multiple letters from pharmaceutical companies including **Hospira, Fresenius Kabi LLC, and Pfizer, Inc.**

Wyoming

Wyoming Statutes § 7-13-916, enacted in 2015, makes “[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” confidential. Under the law, the disclosure of those identities “may not be authorized or ordered” and the information must be redacted from records prior to disclosure.⁷⁹

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

All of the companies that make the medicines in Wyoming’s execution

“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

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.”

Medium Risk States

The following ten 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."

Kansas

There is no secrecy statute relating to drug suppliers in Kansas. The law makes only "[t]he identity of executioners and other persons designated to assist in carrying out the sentence of death" confidential.⁸⁰

But Kansas law authorizes the use of medicines in lethal injection executions⁸¹ 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 effects companies. Rather, it has implemented a more narrow statute that makes the identity of "an individual performing the services of executioner" confidential.⁸²

Kentucky law authorizes the use of medicines in lethal injection executions⁸³ 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, the Attorney General, and the Head of the DOC in Kentucky asking 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."⁸⁴

Louisiana

Louisiana does not have a specific secrecy statute; however, Louisiana law makes the identities of individuals who "participate or perform ancillary functions in an execution of the death sentence, either directly or indirectly," confidential.⁸⁵ Although this law does not reference drug companies or suppliers, it is possible that the Louisiana Department of Public Safety and Corrections (DPS&C) could interpret this law to exempt supplier information from disclosure in the future.

Louisiana law authorizes the use of medicines in lethal injection executions⁸⁶

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

Akorn, Inc.

and the state DPS&C 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 companies. Rather, under Montana law "[t]he identity of the executioner must remain anonymous" and "[f]acts pertaining to the selection and training of the executioner must remain confidential."⁸⁷

Montana law authorizes the use of medicines in lethal injection executions⁸⁸ 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, although the state redacts portions of its execution manual that may relate to secrecy. Nonetheless, Nevada presents a medium risk because its law authorizes the use of medicines in lethal injection executions⁸⁹ and the state has a documented history of acquiring medicines for use in executions in violation of company controls.

In July 2018, **Alvogen, Inc.** filed a lawsuit against Nevada and state officials alleging that the state used secrecy and "subterfuge" to obtain Alvogen's Midazolam for use in an execution in violation of the company's distribution controls.⁹⁰ **Hikma Pharmaceuticals USA Inc.** and **Sandoz Inc.** later intervened, alleging that Nevada also unlawfully acquired their medicines.

A state court judge issued an injunction blocking Nevada from using Alvogen's midazolam in a scheduled execution. The court found that the State "did not acquire Alvogen Midazolam Product in good faith, and it did so knowing that it violated Alvogen's property rights."⁹¹ Because the state evinced "bad faith disregard for Alvogen's rights," the court held that the state was not a "good faith buyer" of the drugs.⁹² It took more than two years for the litigation to be fully resolved, with Nevada agreeing to return the products to all three companies in April of 2020.⁹³

All of the companies that make the medicines in Nevada's protocol are opposed to the misuse of their medicines in executions and have put distribution restrictions in place to prevent sales 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.⁹⁴

Companies have sent numerous letters to the Office of the Governor, the

Nevada officials "were aware when purchasing Alvogen's drugs that [Alvogen] objected to their use in lethal injection and that [Alvogen] had controls in place to prevent sales for such use. Yet [state officials] merely filed those objection letters and never acted upon them. . . . [T]hey resorted to subterfuge."

**Judge Elizabeth
Gonzalez of
Nevada's Eighth
Judicial District**

Attorney General, and the 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."⁹⁵

Ohio

Ohio Code § 2949.221 makes records that identify or could reasonably lead to the identification of a person that "manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, . . . or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs" for use in lethal injection confidential. This provision applies to persons that engaged in the listed actions between March 2015 and March 2017.⁹⁶

Earlier drafts of the secrecy law were even more severe. A prior version directly targeted company contracts, purporting to render "any contract, subcontract, agreement, addendum, or understanding . . . designed to prevent the state . . . from obtaining" drugs for lethal injections void.⁹⁷ Given the apparent unconstitutionality of the contract provision, the legislature ultimately removed it.

Although Ohio secrecy legislation posed substantial risks for companies, those risks have decreased. Vocal company opposition to Ohio's secrecy law has influenced positive developments since 2019.

In July 2017, two pharmaceutical companies, **Fresenius Kabi USA LLC** and **Sandoz AG**, filed an *amicus curiae* brief in support of litigation in Ohio seeking the disclosure of records from the Ohio Department of Rehabilitations and Corrections (ODRC). The companies noted 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. [The Companies] 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 [the companies'] interests, impeding their ability to preserve the integrity of their contracts."⁹⁸

Affected companies have also written directly to the Office of the Governor, the Attorney General, and the Head of the ODRC expressing

"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**

"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**

“[T]he sale of execution drugs to the state of Ohio . . . would be an unfree transaction if a seller had announced its intention not to have its products used in executions and then were deceived in a sale to the State because the drugs were being bought by an anonymous agent.”

**Federal Magistrate
Judge Michael R.
Merz**

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 drugs in violation of their contracts. **Sandoz AG** emphasized how “[t]he 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.”

In 2019, a federal judge in Ohio acknowledged how secrecy distorts the market, explaining: “A free market posits voluntary exchanges between willing buyers and willing sellers. When buyers and sellers have different amounts of information about the proposed transaction, economists refer to the situation as information asymmetry. . . . [T]he sale of execution drugs to the State of Ohio . . . would be an unfree transaction if a seller had announced its intention not to have its products used in executions and then were deceived in a sale to the State because the drugs were being bought by an anonymous agent.”⁹⁹

Over the past year, Ohio has taken steps that demonstrate a greater respect for companies’ positions. In August 2019, Governor Mike DeWine postponed a forthcoming execution. DeWine pointed to communications from pharmaceutical companies, noting that the state couldn’t find any company willing to supply drugs for use in lethal injections. DeWine further relied on the public health risks that could arise from violating company contracts, explaining that if Ohio sought to violate company controls, “thousands of [Ohio] citizens” could see their “health . . . put in peril.”¹⁰⁰ Since then, Governor DeWine has continued to grant reprieves to inmates on death row as drugs remain unavailable.¹⁰¹

Ohio law still requires that the death penalty be implemented via lethal injection.¹⁰² But the positive steps over the last year suggest that the state is no longer actively seeking to acquire drugs in violation of company controls. Moreover, the time limit on Ohio’s secrecy law means that companies should be able to learn about potential diversions after 2017.

Pennsylvania

While Pennsylvania has previously attempted to keep the details surrounding acquisition of drugs intended for use in lethal injections secret, the state has had a moratorium on executions since 2015, lessening the risk that company controls will be violated.

In response to public records requests, Pennsylvania has cited to a confidential administrative “capital case procedures” manual to justify not

revealing information on drug supplies relevant to companies.¹⁰³ Further, the state has cited a statutory provision which renders confidential “[t]he identity of department employees, department contractors or victims who participate in the administration of an execution . . .”¹⁰⁴

In February 2015, Governor Tom Wolf announced a moratorium on the death penalty in the state. The moratorium will remain in effect until the state addresses issues identified by a bipartisan Task Force and Advisory Commission on Capital Punishment.¹⁰⁵ Pennsylvania law authorizes the use of medicines in lethal injection executions,¹⁰⁶ but the risk of circumvention of company contracts is lower while the moratorium remains in place.

South Carolina

South Carolina has not implemented a secrecy provision related to drug suppliers. But the South Carolina Attorney General’s Office has issued an opinion stating that existing statutory language should be broadly interpreted to deny disclosure of such information.¹⁰⁷

South Carolina uses medicines in lethal injection executions and the state DOC may attempt to obtain execution drugs in violation of companies’ distribution controls and rely on its broad interpretation of existing law.

Utah

Utah does not have a secrecy provision in its statutes or administrative regulations. But Utah law authorizes the use of medicines in lethal injection executions.¹⁰⁸ There is thus a risk that the state would attempt to acquire drugs in violation of company distribution controls.

Virginia

In 2020, Virginia became the first state in the U.S. to legislatively repeal a secrecy law. Today, Virginia law expressly holds that “[t]he identity of any outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such outsourcing facility, and any person or entity used by such outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs shall not be confidential, shall be subject to the Virginia Freedom of Information Act . . . and may be subject to discovery or introduction as evidence in any civil proceeding.” The law grants confidentiality for limited personal identifying information, such as addresses and social security numbers.¹⁰⁹

Virginia’s legislative repeal was partially motivated by concerns about public health. Senator John Bell, the sponsor of the repeal bill, expressed concern about Virginia’s prior secrecy law, explaining that the cloak of secrecy could permit diversion of drugs intended for use in executions

“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.

from the corrections system to the wider patient market.¹¹⁰ And in remarks in 2017, then-Lieutenant Governor Ralph Northam pointed to company positions in questioning Virginia’s secrecy law. He noted that “pharmaceutical companies, the majority of them, have said we don’t want the medications that we manufacture used to put people to death” and called for the state to scrutinize its position on secrecy.¹¹¹

While the secrecy repeal is a positive step, Virginia law still authorizes the use of lethal injection.¹¹² Thus, while the risk has lessened, state officials may still attempt to circumvent company distribution controls in pursuing medicines for use in executions.

Low Risk States

The following twenty-four 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.”

Alaska

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

California

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

Colorado

Colorado has no secrecy policy in place. Further, in 2020, Colorado abolished the death penalty and the Governor commuted the sentences of the remaining persons on death row.¹¹³ It is unlikely that Colorado will circumvent company contracts 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 drugs intended for use in lethal injections.¹¹⁴

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 Hampshire

New Hampshire 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.

Oregon

Oregon does not have a secrecy statute or regulation in place that specifically applies to companies. The state does have an administrative rule providing that “executions will be conducted in a manner designed to make confidential the identity of Department staff and other persons involved [in an execution].”¹¹⁵

While Oregon law authorizes the use of medicines in lethal injection executions, the state has maintained a moratorium on executions since 2011 across the administrations of Governors John Kitzhaber and Kate Brown. It does not currently appear that Oregon is likely to circumvent company contracts or agreements.

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.

Washington

Washington 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.

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

Overview of execution secrecy laws
and implications for commercial
enterprises and public health

For further information please refer to the
Lethal Injection Information Center:
<http://lethalinjectioninfo.org>