Lethal Injection Information Center
Preventing the misuse of medicines in lethal injections

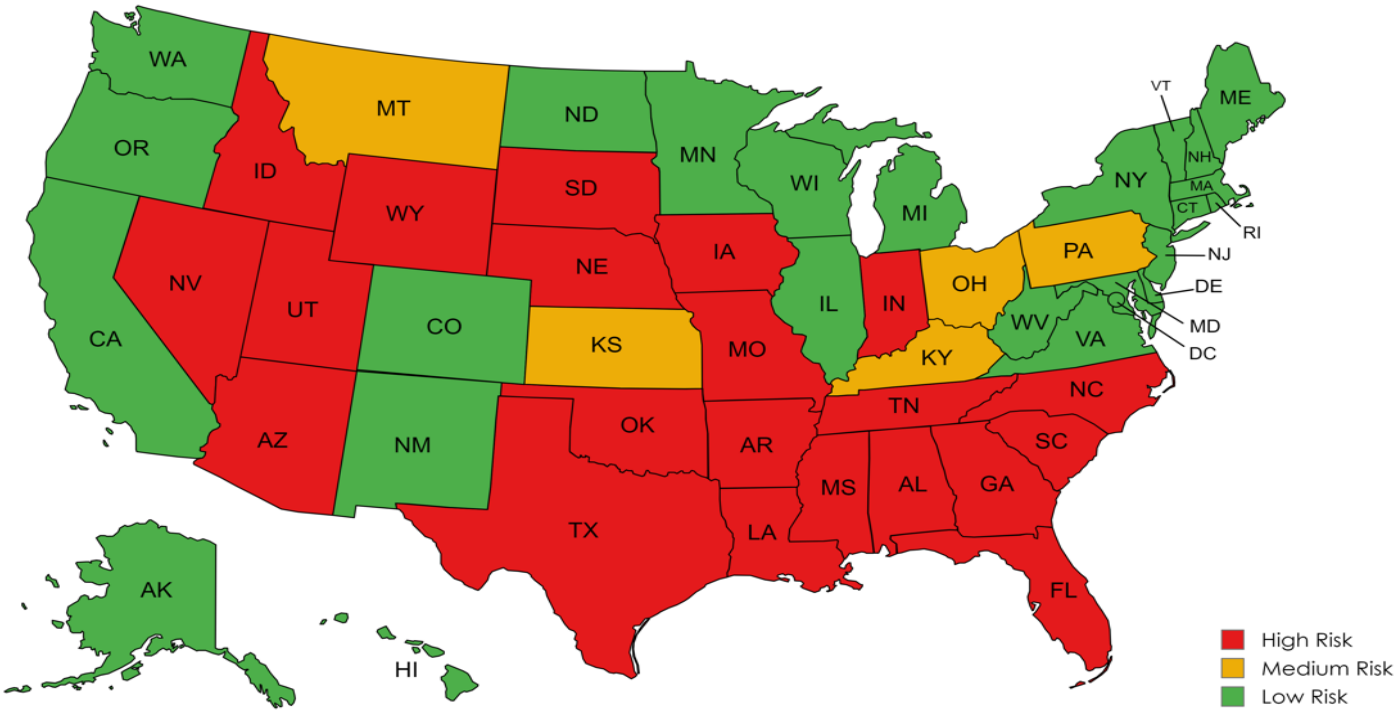
Respecting Corporate Contracts:

State-by-State Risk Index

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

Fourth Edition
May 2024

Fig. 1. Ratings on Levels of Risk



High Risk

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

Medium Risk

Kansas
Kentucky
Montana
Ohio
Pennsylvania

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
Virginia
Washington
West Virginia
Wisconsin

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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.

Contents

Introduction..... 6
Note on Fourth Edition..... 8
Overview..... 10
Arkansas Case Study..... 12
Virginia Case Study..... 13
Methodology..... 14
High Risk States..... 16
- Alabama..... 17
- Arizona..... 17
- Arkansas..... 18
- Federal Government..... 20
- Florida..... 21
- Georgia..... 22
- Idaho..... 23
- Indiana..... 24
- Louisiana..... 25
- Mississippi..... 26
- Missouri..... 27
- Nebraska..... 28
- Nevada..... 30
- North Carolina..... 31
- Oklahoma..... 32
- South Carolina..... 33
- South Dakota..... 34
- Tennessee..... 35
- Texas..... 36
- Utah..... 37
- Wyoming..... 37

Medium Risk States..... 38
- Kansas..... 39
- Kentucky..... 39
- Montana..... 39

Ohio 40
Pennsylvania 41
Low Risk States 44
Alaska 45
California 45
Colorado 45
Connecticut 45
Delaware 45
District of Columbia 45
Hawaii 46
Illinois 46
Iowa 46
Maine 46
Maryland 46
Massachusetts 46
Michigan 46
Minnesota 46
New Hampshire 47
New Jersey 47
New Mexico 47
New York 47
North Dakota 47
Oregon 47
Rhode Island 48
Vermont 48
Virginia 48
Washington 49
West Virginia 49
Wisconsin 49
References 50

Introduction

In recent years, an increasing number of states have implemented harmful legislation or policies – commonly referred to as secrecy laws – restricting information related to executions. These expansive secrecy laws 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. As five global companies challenging these practices expressed in legal filings in January 2024, such secrecy laws not only compromise the safety and efficacy of drugs, including lethal injection drugs, they also undermine a company's ability to monitor the supply chain and enforce their contracts. Ultimately, these practices harm the commercial interests of manufacturers, by exposing them to financial, reputational and legal risks.[2]

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 complementary legal filing from January 2024, public health experts highlighted that:

"Secrecy laws prevent federal drug enforcement officials and the public from understanding the sources of execution drugs and how they are acquired, safeguarded, and used [...] The ensuing compromised federal enforcement necessarily injures the public health by, for example, allowing the continuation and perpetuation of illicit drug supply chains that greatly increase the chances and instances of lethal, dangerous drugs reaching the general public."[3]

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"[4] 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 Fourth Edition

In the six 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 before the state then completely abolished the death penalty in 2021.

In 2023 and early 2024, harmful legislation was passed expanding execution secrecy in Louisiana, South Carolina and Utah. This new legislation creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines.

The fourth edition incorporates several changes in categorizations. Louisiana, South Carolina and Utah have changed from medium to high risk.

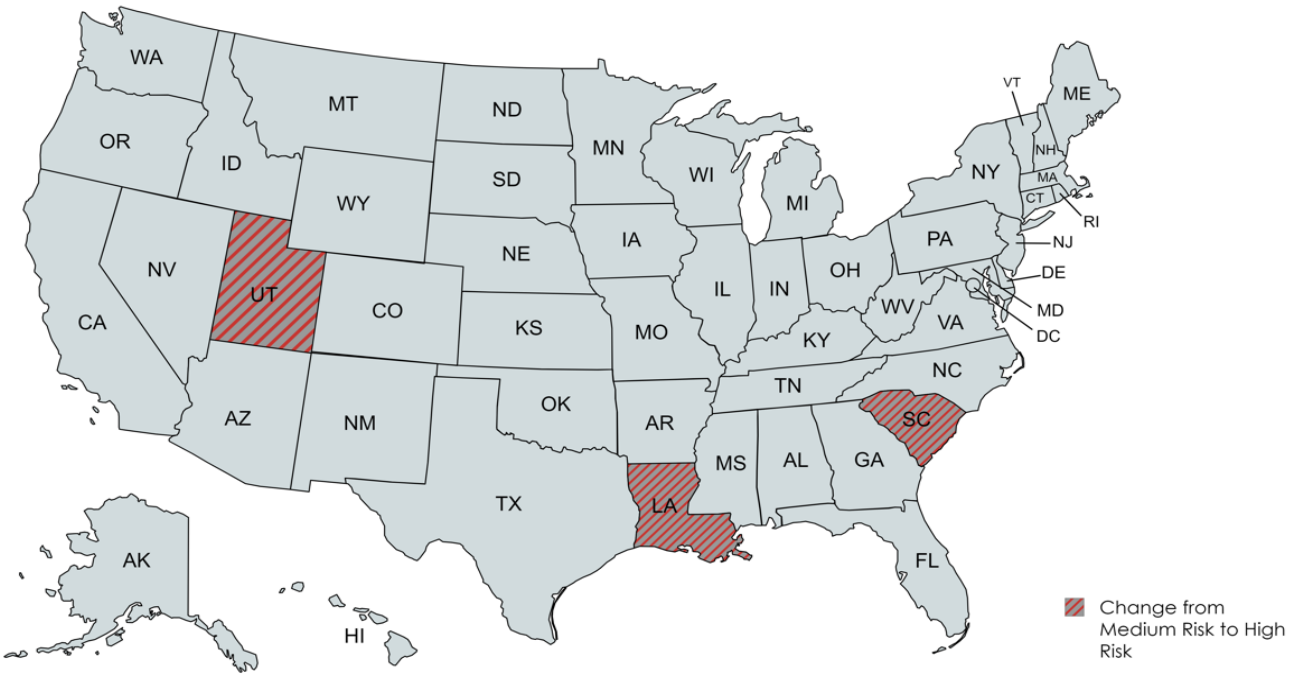
High Risk: The number of states in the high-risk category has increased from 17 to 20, and with the addition of the federal government, the current total is 21.

Medium Risk: The number of states in the medium-risk category has decreased from 8 to 5.

Low Risk: The number of states in the low-risk category has remained at 26, including the District of Columbia.

Figure 2 on the following page depicts those changes.

Fig. 2. Changes in Fourth Edition



Overview

High Risk

Twenty 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."**

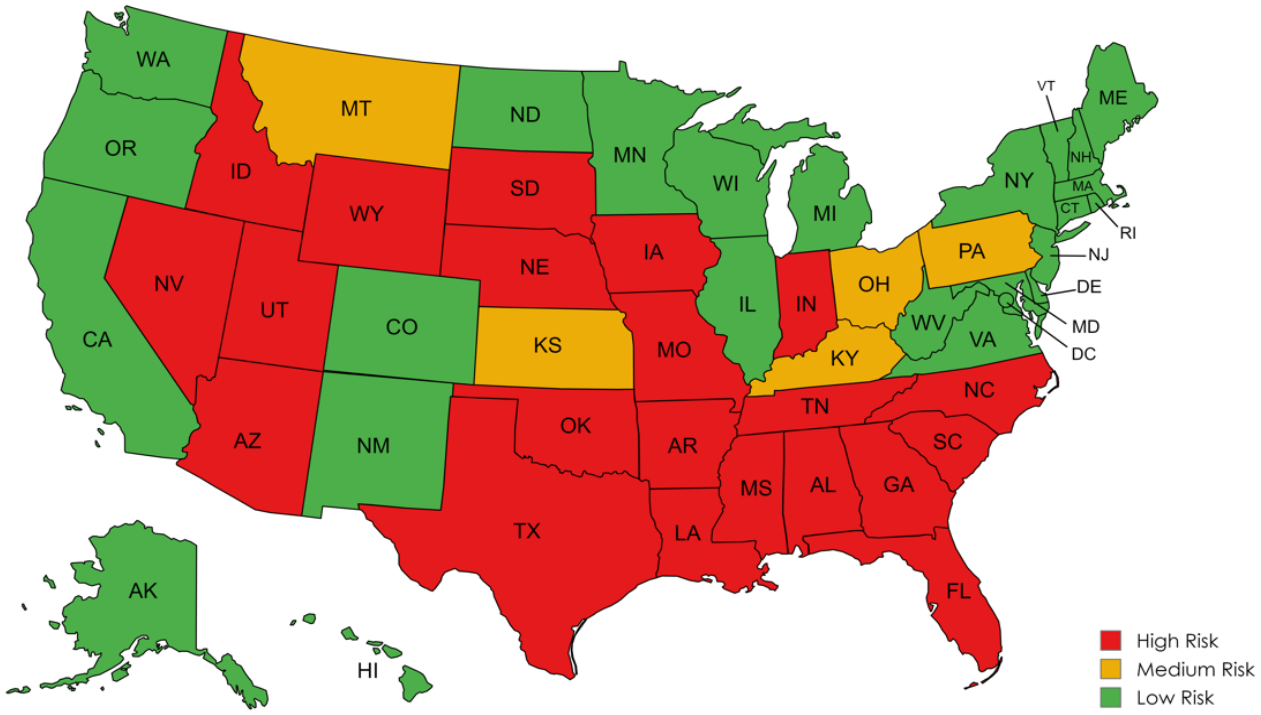
Medium Risk

Five 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-five 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
Louisiana
Mississippi
Missouri
Nebraska
Nevada
North Carolina
Oklahoma
South Carolina
South Dakota
Tennessee
Texas
Utah
Wyoming

Medium Risk

Kansas
Kentucky
Montana
Ohio
Pennsylvania

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
Virginia
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.[5]

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."[6] 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.[7]

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.[8]

"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.[9]

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."[10] 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.[11]

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.[12] 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.[13]

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.[14] As detailed below, the death penalty was then completely abolished in Virginia in 2021.

"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 twenty 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

Midazolam, Rocuronium Bromide, Potassium Chloride (3 drug protocol)

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.[15] Alabama's secrecy policy is one of the strictest in the US, making all documents associated with an execution confidential,[16] 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. Since 2018, the Alabama DOC has disclosed its redacted execution protocol on several occasions, in response to litigation, although this does not reveal any information about the drug supplies.

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 Pharmaceuticals**, 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."[17]

On November 21, 2022, Alabama announced that all executions in the state will be halted pending a top to bottom review of the state's execution protocol.[18] This was the first time in the state's history that a review of this nature had been proposed and followed a spate of botched executions.

However, on January 16, 2023, Alabama Supreme Court approved changes to the state's procedures to extend the time period during which an execution can be carried out to 30 days - indicating that the state was preparing to resume executions.[19]

Indeed, in 2023, Alabama executed two individuals via lethal injection. In so doing, Alabama officials may have knowingly and deliberately undermined the contractual restrictions that companies have established to prevent the sale of their drugs to death rows.

Arizona

Pentobarbital (1 drug protocol); Sodium Thiopental (1 drug protocol)

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.[20] 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."[21]

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.[22] 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."[23]

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

Lundbeck A/S

On January 20 2023, Governor Katie Hobbs ordered a review of the state's method of execution, effectively pausing executions in Arizona in a bid to foster improved transparency, accountability and safety over the execution process.[24] Although this announcement temporarily reduces the risk to pharmaceutical companies, Arizona has a history of attempting to secure drugs under the cover of secrecy.

Arkansas

Midazolam, Vecuronium Bromide, Potassium Chloride (3 drug protocol)

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 and a $10,000 fine.[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 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

"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.

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.

Federal Government

Pentobarbital (1 drug protocol)

"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

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]

On 1 July 2021, Attorney General of the United States Merrick Garland issued a memorandum formally pausing federal executions, while the Department of Justice undertakes a review of executive branch policies adopted in the last two years of the Trump administration.[37] This will include a review of the Addendum to the Federal Execution Protocol, adopted in 2019, and will assess, among other things, the risk of pain and suffering associated with the use of pentobarbital. Nevertheless, 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.

Florida

Etomidate, Rocuronium Bromide, Potassium Acetate (3 drug protocol)

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.[38] Another provision of that section makes "information which if released would jeopardize a person's safety" confidential.[39]

In 2022, Florida amended the statute, broadening its scope to explicitly include manufacturers and to make the confidentiality provisions retroactive. Now, the following is deemed to be confidential: "Information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution…"[40]

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

"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.

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.[41]

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.

"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

Georgia

Pentobarbital (1 drug protocol)

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."[42] In 2021, the legislature amended the secrecy law to add a criminal penalty for

unlawful disclosure, which under the statute is now classified as a misdemeanor, punishable by a fine of up to $1,000 and up to one year in jail.[43]

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

Sodium Thiopental, Pancuronium Bromide, Potassium Chloride (3 drug protocol); Pentobarbital, Pancuronium Bromide, Potassium Chloride (3 drug protocol); Sodium Thiopental (1 drug protocol); Pentobarbital (1 drug protocol)

In 2022, Idaho enacted execution secrecy legislation. Idaho Code Ann. § 19-2716A states that: "the identities of any of the following persons or entities involved in the planning, training, or performance of an execution shall be confidential, shall not be subject to disclosure, and shall not be admissible as evidence or discoverable in any proceeding before any court, tribunal, board, agency, or person: (a) The on-site physician and any member of the escort team or medical team; and (b) Any person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process."

The secrecy provision also exempts these people from the state's controlled substance laws and laws and regulations governing the practice of medicine. Prior to the passage of the secrecy law, Idaho relied on a DOC regulation to conceal execution-related records from public disclosure. The Idaho DOC also amended Rule 135 in 2022 to conceal information relating to suppliers of lethal injection drugs.[44]

This law hides the identities of the manufacturers who are classed as being involved in the "planning, training or performance of an execution". It encourages state officials to secretly and illicitly purchase these medicines without companies' knowledge or consent. This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted

"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.

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."[45]

Manufactured drugs have been implicated in at least one high profile botched execution in Idaho. In February 2024, Thomas Creech's execution was halted due to problems administering the lethal injection.[46] IDOC officials acquired the drugs using illicit channels and refused to disclose key information that would have allowed manufacturers to protect their medicines.[47]

Indiana

Methohexital Sodium (or) Pentobarbital (or) Sodium Thiopental, Pancuronium Bromide (or) Vecuronium Bromide, Potassium Chloride (3 drug protocol)

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.[48] 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.[49]

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.

"[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."

Dr. Leonidas George Koniaris

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."[50]

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."[51]

Louisiana

Pentobarbital (1 drug protocol); Midazolam, Hydromorphone (2 drug protocol)

In March 2024, Louisiana passed a far-reaching secrecy statute that comes into force on July 1, 2024.

Sections 15:569 and 15:570 of the Revised Statutes of Louisiana will mandate that "identifying information" relating to "any person, business, organization, or other entity directly or indirectly involved" in an execution is subject to "absolute confidentiality."[52] This includes "any person who participates or performs ancillary functions in the execution process" including a business that "delivers, dispenses, distributes, supplies, manufactures, or compounds the drugs." Moreover, secrecy extends not just to directly identifying information but more broadly to "records that…could reasonably lead to the identification" of a participant in an execution.

Identifying information may not be disclosed in judicial, legislative, or administrative proceedings. A person or entity whose identity is disclosed has a civil right of action for damages, including punitive damages in case of wilful disclosure.

This law creates a significant burden for companies seeking to effectively monitor the supply chain for restricted medicines. On the face of the statute, companies seeking to comply with regulatory reporting obligations or enforce contractual distribution controls may be considered in violation of the secrecy law.

Communications by pharmaceutical companies opposed to the misuse of medicines in executions have been critical in informing policies and practices in Louisiana in recent years. For example, in 2022, officials noted that they were unwilling to use manufactured medicines in lethal injection executions,[53] with Corrections Secretary James LeBlanc testifying in court that the state did not want to jeopardize healthcare or risk the prison population by underhandedly purchasing drugs for executions.

Unfortunately, since then, a handful of legislators have sought to misrepresent the industy position, asserting that secrecy is needed because pharmaceutical manufacturers have an interest in providing the drugs and are only not doing so because of the risk of exposure.[54]

There are ongoing discussions in Lousiana about the future of lethal injection and the industry perspective will continue to be critical.

"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

Mississippi

Sodium Thiopental (or) Pentobarbital (or) Midazolam, Pancuronium Bromide (or) Vecuronium Bromide (or) Rocuronium Bromide, and Potassium Chloride (3 drug protocol)

In 2016, Mississippi passed legislation making the identities of suppliers located within the state of chemicals to be used in lethal injections 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."[55]

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.[56] 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."[57]

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.

"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.

Missouri

Pentobarbital (1 drug protocol)

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 . . ."[58] In 2013, the state revised its execution protocol to include the suppliers and producers of the drugs used in lethal injection executions in its "execution team."[59] 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.[60]

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.[61]

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

"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.

immediately . . . If you have any remaining pentobarbital, we ask that you return it to us."[62] 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."[63]

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. — 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."[64]

"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

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

Fentanyl, Diazepam, Cisatracurium Besylate, Potassium Chloride (4 drug protocol)

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.[65] 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.[66]

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.[67] 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.[68]

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.[69]

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."[70]

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**,

"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

claiming that the product was intended for patient use in Africa.[71] 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.[72] 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 DCS alleged that she had been told to obtain sodium thiopental "by any means."[73]

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.

Nevada

Fentanyl (or) Alfentanil, Ketamine, Potassium Chloride (or) Potassium Acetate (3 drug protocol); Fentanyl (or) Alfentanil, Ketamine, Cisatracurium Besylate, Potassium Chloride (or) Potassium Acetate (4 drug protocol)

There is currently no execution secrecy statute in Nevada, although the state redacts portions of its execution manual that may relate to secrecy. The Department of Corrections has released records related to the state's lethal injection supplies in response to public records requests and in the context of Eighth Amendment litigation.[74] Further, a lower state court in Nevada has ruled in favor of broad and expedient disclosure of execution-related records. *ACLU of Nevada v. Nevada Department of Corrections* concerned the ACLU's request for information related to the scheduled execution of Scott Dozier by the State of Nevada in July 2018, using an experimental protocol which included diazepam, fentanyl, and cistatracurium besylate.[75]

Nonetheless, Nevada presents a high risk because its law authorizes the use of medicines in lethal injection executions[76] and the state has a documented history of acquiring medicines for use in executions in violation of company controls. At a hearing on April 25, 2022, the Director of NDOC confirmed they are actively seeking drugs and instructed the chief pharmacist to continually attempt to purchase the medications set forth in the protocol.

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

"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

Midazolam for use in an execution in violation of the company's distribution controls.[77] **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."[78] 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.[79] 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.[80]

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.

Companies have sent numerous letters to the Office of the Governor, the 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."[81]

"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.

North Carolina

Pentobarbital (1 drug protocol)

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.[82]

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."[83]

Oklahoma

Pentobarbital (or) Sodium Thiopental (1 drug protocol); Midazolam, Vecuronium Bromide, Potassium Chloride (3 drug protocol)

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.[84] The statute also exempts state purchases of drugs for use in lethal injection from the state's purchasing transparency act. In April 2024, the Oklahoma legislature expanded its secrecy law, mandating that confidentiality applies not only to the identity of any person who participates in an execution, but also any record or information that can "reasonably lead directly or indirectly to the identification" of such a person.[85]

"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, Former Director of the Oklahoma DOC

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 Februrary 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.[86] Following Oklahoma's abrupt return to lethal injection, retired Akin Gump attorney Fred Hodara submitted written public records requests to the DOC in an effort to seek information related to the DOCs plan to resume lethal injection executions.[87] This litigation is still pending before the District Court of Oklahoma. Over the course of discovery, the DOC acknowledged that it had not even conducted a search for responsive records, and later provided documents that were almost wholly redacted. The course of the litigation so far indicates that the state continues to hinder company efforts to protect their medicines from misuse. The case is set to go to trial later in 2024.

In August 2022, Oklahoma began its mass execution of 25 prisoners over two years. Newly-released court records from 2020 show that officials from the Oklahoma DOC testified that their Midazolam supplies at the time were "made by a manufacturer" despite the fact that 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.[88]

The February 2020 announcement came after Oklahoma became the first state to categorically reject lethal injection as a method of execution in 2018.[89] 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."[90]

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

South Carolina

Pentobarbital (or) Sodium Thiopental, Pancuronium Bromide, Potassium Chloride (3 drug protocol)

In May 2023, South Carolina passed a far-reaching secrecy statute.[91] Section 24-3-580 of the South Carolina Code mandates that "all identifying information" relating to members of the "execution team" is subject to "absolute confidentiality."[92] The execution team is defined broadly to include "any person or entity that participates" in an execution, including any entity that "prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs."

Identifying information may not be disclosed in judicial, legislative, or administrative proceedings. Violating these provisions may be punished by a fine and a prison sentence of three years.

The inclusion of manufacturers in the expanded execution team, in combination with the potential civil and criminal sanctions for disclosure of any information relating to the execution drugs or team, present serious commercial risks for companies. On the face of the statute, companies seeking to comply with regulatory reporting obligations or enforce contractual distribution controls may be considered in violation of the secrecy law.

Throughout the legislative session in South Carolina, the position of the pharmaceutical industry was falsely represented. Governor McMaster

"The South Carolina secrecy law not only compromises the safety and quality of medicines, including drugs used in lethal injections; it also threatens public health, and undermines the commercial interests of Manufacturers, by exposing them to legal, fiscal, and other harms."

Amicus Brief of Pharmaceutical Manufacturers

erroneously noted that the companies who make the drugs on South Carolina's protocol "will not sell them unless their identities are shielded by state law," and urged the general assembly to pass this legislation - despite the pharmaceutical industry's express wish not to be associated with executions.[93]

On January 31, 2024, five manufacturers of medicines that are misused in lethal injection protocols collectively filed an amicus brief to state their deep concern about South Carolina's secrecy law.[94]

In the brief, **Exela Pharma Sciences**, **Fresenius Kabi USA**, **Hikma Pharmaceuticals USA Inc.**, **Sagent Pharmaceuticals** and **Sandoz Inc.** robustly countered the misstatement made by South Carolina officials that manufacturers want secrecy in order to sell their drugs to be used in executions.

They further outlined their opposition to the secrecy law on the basis that it not only compromises the safety and efficacy of drugs, including lethal injection drugs, it also threatens public health, undermines the commercial interests of manufacturers, and exposes them to financial, reputational and legal risks.

South Dakota

Sodium Thiopental (or) Pentobarbital, Pancuronium Bromide, Potassium Chloride (3 drug protocol); Sodium Thiopental (or) Pentobarbital, Pancuronium Bromide (2 drug protocol); Sodium Thiopental (or) Pentobarbital (1 drug protocol)

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.[95] The legislature passed the amendment at the request of the Attorney General. Disclosure of the above information is a Class 1 misdemeanor, punishable by up to one year in jail and a fine of up to $2,000.[96]

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 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.

"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

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

Midazolam, Vecuronium Bromide, Potassium Chloride (3 drug protocol)

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.[97]

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.

In May 2022, Tennessee's Republican Governor Bill Lee imposed an official moratorium on executions while an independent review of the lethal injection protocol is carried out.[98]

This announcement followed the last-minute cancellation of Oscar Smith's execution in Tennessee after officials failed to test its drugs for bacterial endotoxins. Governor Lee appointed former US Attorney Ed Stanton to conduct the review and investigate the following: what led to testing the lethal injection chemicals for only potency and sterility but not endotoxins ahead of the April 21 execution; clarity around the lethal injection process manual, which was last updated in 2018, and adherence to testing policies since the update; Tennessee Department of Correction staffing considerations.[99] In December 2022, the finalised review highlighted the fact that Tennessee has not complied with its own lethal injection protocol ever since it was revised in 2018.[100]

In addition to using compounded Midazolam and Potassium Chloride, Tennessee has secretly acquired manufactured Vecuronium Bromide, in contravention of the contracts and wishes of the companies who make this product. Pharmaceutical companies may have played a driving role in pausing executions in Tennessee by proactively investigating possible diversions and communicating their opposition to state leaders.

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.**.

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

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. While the temporary moratorium reduces the risks to pharmaceutical companies, 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

Pentobarbital (1 drug protocol)

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.[101]

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.

"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."

TDCJ ordered compounded pentobarbital from the company under the name "Huntsville Unit Hospital," misleading it about the intended use of the drug.[102] 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.

Lundbeck

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."[103] Since that time, TDCJ has received multiple letters from pharmaceutical companies including **Hospira**, **Fresenius Kabi LLC**, and **Pfizer, Inc.**

Utah

Sodium Thiopental, Pancuronium Bromide, Potassium Chloride (3 drug protocol)

In February 2024, Utah's governor signed a new execution secrecy bill into law.[104]

Section 64-13-27 of the Utah Code prohibits the disclosure of the "identifying information of a person who participates in or administers the execution of a death sentence."

The law explicitly includes any person who "manufactures, supplies, compounds, or prescribes drugs, medical supplies, medical equipment, or any other equipment used in the execution." Such identifying information may not be released through a judicial process or used as legal evidence.

Moreover, the secrecy law requires the destruction of execution records within 90 days and their classification as "protected" records under Utah's public records laws, making them virtually impossible to access.

Intentional violations of the secrecy law (including, potentially, corporate investigations into supply chain compliance with distribution contracts), could lead to criminal sanctions of up to 6 months of jail time and a $1,000 fine.

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.

Wyoming

Sodium Thiopental, Pancuronium Bromide, Potassium Chloride (3 drug protocol)

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.[105]

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 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.

Medium Risk States

The following five 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 disgnated "medium risk."

Kansas

Sodium Thiopental, Pancuronium Bromide, Potassium Chloride (3 drug protocol)

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.[106]

But Kansas law authorizes the use of medicines in lethal injection executions[107] and the state DOC is actively attempting to obtain execution drugs in violation of companies' distribution controls.

Kentucky

Pentobarbital (or) Sodium Thiopental (1 drug protocol)

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.[108]

Kentucky law authorizes the use of medicines in lethal injection executions[109] 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."[110]

Montana

Sodium Thiopental (or) Pentobarbital, Rocuronium Bromide (or) Pancuronium Bromide (2 drug protocol)

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."[111]

Montana law authorizes the use of medicines in lethal injection executions[112] and the state DOC is actively attempting to obtain execution drugs in violation of companies' distribution controls.

Ohio

Pentobarbital (or) Sodium Thiopental (1 drug protocol); Midazolam, Vecuronium Bromide (or) Rocuronium Bromide (or) Pancuronium Bromide, Potassium Chloride (3 drug protocol)

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.[113]

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.[114] 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.

"[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

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."[115]

Affected companies have also written directly to the Office of the Governor, the Attorney General, and the Head of the ODRC expressing 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 asymetry. . . . [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."[116]

Over the past five years, 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."[117] Since then, Governor DeWine has continued to grant reprieves to inmates on death row as drugs remain unavailable.[118]

In January 2024, DeWine confirmed that he expects there will be no further executions before he leaves office. In his speech, he referenced communications from pharmaceutical companies who have educated him on the potential negative public health consequences of the diversion and misuse of medicines in executions.[119]

Ohio law still requires that the death penalty be implemented via lethal injection.[120] But the positive steps over the last five years 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.

"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

Pennsylvania

Current moratorium (since 2015)

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 litigation, Pennsylvania has cited to a confidential administrative "capital case procedures" manual to justify not revealing information on drug supplies relevant to companies.[121] Further, the state has cited a statutory provision (§ 4305) which renders confidential "[t]he identity of department employees, department contractors or victims who participate in the administration of an execution . . ."[122] The statute took effect in 2009 and has not been amended since that time.

In February 2015, then 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.[123]

On February 16, 2023, newly elected Governor Josh Shapiro announced that he will continue his predecessor's moratorium on executions and called upon the Pennsylvania General Assembly to repeal the death penalty.[124]

Pennsylvania law authorizes the use of medicines in lethal injection executions,[125] but the risk of circumvention of company contracts is lower while the moratorium remains in place.

Low Risk States

The following twenty-five 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. Some have abolished the death penalty or have introduced a moratorium. These states have been designated "low risk."

Alaska

Abolished the death penalty in 1957

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

California

Current moratorium on executions (since 2019)

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

Colorado

Abolished the death penalty in 2020

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.[126] It is unlikely that Colorado will circumvent company contracts in the future.

Connecticut

Abolished the death penalty in 2012

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

Delaware

Abolished the death penalty in 2016

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.[127]

District of Columbia

Abolished the death penalty in 1981

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

Abolished the death penalty in 1957

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

Illinois

Abolished the death penalty in 2011

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

Iowa

Abolished the death penalty in 1965

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

Maine

Abolished the death penalty in 1887

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

Maryland

Abolished the death penalty in 2013

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

Massachusetts

Abolished the death penalty in 1984

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

Michigan

Abolished the death penalty in 1847

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

Minnesota

Abolished the death penalty in 1911

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

Abolished the death penalty in 2019

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

Abolished the death penalty in 2007

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

Abolished the death penalty in 2009

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

Abolished the death penalty in 2007

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

Abolished the death penalty in 1973

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

Current moratorium on executions (since 2011)

Oregon does not have a secrecy statute or regulation in place that specifically applies to companies. The state does has 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]."[128]

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.

On December 13, 2022, Governor Kate Brown announced that she would grant clemency to all 17 people on Oregon's death row. Their sentences were commuted to life without parole.[129] It does not currently appear that Oregon is

likely to circumvent company contracts or agreements.

Rhode Island

Abolished the death penalty in 1984

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

Abolished the death penalty in 1972

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

Virginia

Abolished the death penalty in 2021

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.[131]

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 from the corrections system to the wider patient market.[132] 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.[133]

On March 24, 2021, Governor Ralph Northam signed legislation to end the death penalty in Virginia and reduce the sentences of the two death-row prisoners to life without parole.[134] It is therefore unlikely that Virginia will circumvent company contracts in the future.

Washington

Abolished the death penalty in 2018

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

Abolished the death penalty in 1965

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

Abolished the death penalty in 1853

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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