

April 2, 2021

Assistant Attorney General Sara Cable
Chief of the Data Privacy and Security Division
Massachusetts Office of the Attorney General
1 Ashburton Place
Boston, MA 02108-1698

Dear Assistant Attorney General Cable:

We, the undersigned organizations, write in regard to the process that pharmacies in Massachusetts—including Walgreens and CVS—are using to distribute COVID-19 vaccines. We are specifically concerned about the collection and use of personal data for commercial purposes unrelated to the administration of these life-saving vaccines. Pharmacies are requiring patients seeking access to the vaccine to register through their existing customer portals, which in turn exposes patients to broad personal data collection and marketing. The line between the public health task of administering vaccines and the commercial practices of the administering companies is being blurred. State and federal governments share a common public health goal of promoting vaccinations and should seek to remove barriers to accessing the COVID-19 vaccine and promote public trust in the distribution process.

We request that your office promptly investigate the pharmacies' data collection practices for the vaccine distribution programs used by Walgreens and CVS in Massachusetts. Pharmacies should not require individuals to submit to systems that broadly use the personal information of patients as a prerequisite for receiving the COVID-19 vaccine. There are already reports that some pharmacies plan to use this personal information to market their products to COVID-19 vaccine recipients. Patients should not have to trade unrestricted use of their sensitive personal information for a life-saving vaccine. We believe these practices are unfair and deceptive and should be halted immediately. In order to promote a robust and effective vaccine distribution program, we believe pharmacies should do the following: refrain from automatically enrolling vaccine registrants in their marketing databases; collect and use only the minimum personal data that is necessary to facilitate administration of the vaccine; and segregate vaccine registrant data from all commercial and marketing databases.

The FDA issued the first emergency use authorization for the COVID-19 vaccine on December 11, 2020.¹ The rollout for this long-awaited vaccine proved slow, with only 2.8 million patients receiving the first dose by the end of 2020—far short of the federal government's goal of 20 million.² Every state experienced supply and distribution issues, leading

¹ *Pfizer-BioNTech COVID-19 Vaccine*, FDA (Feb. 3, 2021), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine#additional>.

² Rebecca Robbins, Frances Robles, & Tim Arango, *Here's Why Distribution of the Vaccine Is Taking Longer Than Expected*, N.Y. Times (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/health/vaccine-distribution-delays.html> (“These sorts of logistical problems in clinics across the country have put the campaign to vaccinate the United States against Covid-19 far behind schedule in its third week, raising fears about how quickly the country will be able to tame the epidemic.”); Sharon Terlep & Jaewon Kang, *Covid-19*

to a “chaotic scramble” to vaccinate patients.³ These issues, combined with accessibility concerns⁴ and hesitancy around the vaccine,⁵ led to fewer vaccinations than projected by the end of 2020. On February 11, 2021, the Biden Administration announced a federal program to deliver vaccines directly to retail pharmacies.⁶ The program initially included CVS, Walgreens, Walmart, and Kroger as distribution sites for tens of millions of doses per month,⁷ meaning that “[t]he job of vaccinating large swaths of the population [would] fall largely on retail pharmacies[.]”⁸

According to recent press reports, pharmacies “are collecting data from millions of customers as they sign up for [vaccine] shots, enrolling them in patient systems and having recipients register customer profiles.”⁹ But this data is not only being used for vaccine distribution—these retailers, charged with distributing vaccines to protect the health of millions, are using personal information to promote their products and services, tailor marketing, and keep in touch with customers.¹⁰ We understand that some information is necessary to establish vaccine eligibility and schedule appointments. But certain pharmacies appear to have plans to use patients’ sensitive personal information for purposes beyond the limited scope of vaccine distribution. For example, CVS executives “plan to stay in touch with vaccine recipients beyond receiving their second shot and use information gleaned in the process to better market to

Vaccines to Stress-Test Grocery Stores and Pharmacies, Wall Street J. (Feb. 2, 2021), <https://www.wsj.com/articles/covid-19-vaccines-to-stress-test-grocery-stores-and-pharmacies-11612175400> (“The U.S. fell far short of its initial goal of inoculating 20 million people by the end of 2020, with health departments, hospital systems and long-term-care facilities beset by supply-chain bottlenecks, vaccine hesitancy and confusing, scattershot systems for making appointments.”).

³ Alexander Smith, *Covid Vaccines: Rollout in Disarray in U.S. and Abroad*, NBC News (Jan. 31, 2021), <https://www.nbcnews.com/news/world/covid-vaccines-rollout-disarray-u-s-abroad-n1256144> (“All 50 states in the U.S. are reporting shortages as America’s fragmented administrative and health care systems struggle to distribute even the limited vaccine stocks that have been produced.”).

⁴ Rebecca Heilweil, *A Big Hurdle for Older Americans Trying to Get Vaccinated: Using the Internet*, Vox (Jan. 27, 2021), <https://www.vox.com/recode/22250606/older-americans-seniors-computer-literacy-skills-internet-digital-divide> (“Many states and localities across the US are offering online tools like websites and apps as the primary way to register for vaccine appointments. . . . That means snagging an appointment quickly involves computer skills and internet access, or at least help from someone else. But America’s digital divide is getting in the way: Nearly 30 percent of people in the US over the age of 65 do not use the internet, and more than 40 percent did not have broadband access at home[.]”).

⁵ See Laura Santhanam, *5 Stories About COVID-19 Vaccine Mistrust from Americans of Color*, PBS (Feb. 24, 2021), <https://www.pbs.org/newshour/health/for-americans-of-color-considering-the-covid-19-vaccine-heres-why-trust-is-so-important>; Jeffrey Kluger, *Too Many Americans Still Mistrust the COVID-19 Vaccines. Here’s Why*, Time (Jan. 5, 2021), <https://time.com/5925467/covid-19-vaccine-hesitancy/>; Phil McCausland, *Rural Doctors Face Vaccine Distrust and Conspiracies. They Have a Plan.*, NBC News (Dec. 13, 2020), <https://www.nbcnews.com/news/us-news/rural-doctors-face-vaccine-distrust-conspiracies-they-have-plan-n1250953>.

⁶ Terlep & Kang, *supra* note 2.

⁷ *Id.* (“CVS says it can vaccinate 20 million to 25 million people a month once supplies are available. Walmart said in January that it would be able to vaccinate 10 million to 13 million a month.”).

⁸ *Id.*

⁹ Sharon Terlep, *CVS, Walgreens Look for Big Data Reward From Covid-19 Vaccinations*, Wall Street J. (Mar. 2, 2021), <https://www.wsj.com/articles/cvs-walgreens-look-for-big-data-reward-from-covid-19-vaccinations-11614681180>.

¹⁰ *Id.*

them.”¹¹ This would be a misuse of personal data and would constitute an unfair and deceptive trade practice. And as states expand eligibility in the coming weeks to teenagers 16 years old and above, and later to children and teens, secondary uses of data collected for vaccine registration purposes especially warrants close examination and restriction. We ask that you investigate the matter promptly.

Several other pharmacies, including Walmart, Walgreens, Hartig, and Kroger, have similarly engaged in unfair trade practices by marketing to patients who attempt to obtain the COVID-19 vaccine. Walmart requires patients to set up patient profiles with Walmart’s online system in order to receive the vaccine,¹² which means patients are automatically enrolled to receive marketing emails from Walmart unless they opt-out.¹³ Walgreens requires patients to sign up for a Walgreens account in order to schedule an appointment.¹⁴ Patients who sign up for a Walgreens account in order to receive a vaccine are automatically enrolled in marketing emails unless they opt out, and they also agree to allow Walgreens to “automatically collect information about [them] and [their] use of [Walgreen] Services, including without limitation, your real-time location, MAC address, and IP address.”¹⁵ Hartig Drug Stores analyzes data on what patients buy when they receive vaccinations and has urged staff to highlight aftercare items, such as ibuprofen and ice packs, to patients.¹⁶ Hartig’s CEO noted that the vaccination process has brought in new customers, stating “[w]e encourage the products we have in the store and encourage [customers] to purchase those[.]”¹⁷ Kroger is reportedly trying to work with brands to offer products during vaccinations and “sees opportunities to promote using food as medicine.”¹⁸ In order to promote accessibility and increase the number of vaccinated people, we urge your office to investigate the practice of marketing to patients who attempt to receive the COVID-19 vaccine. Patients should not be subject to marketing emails and data collection in order to receive a vaccine that protects their own health and the health of those around them. Vaccine recipients may be under the impression that the information they submit to these pharmacies is covered by the Health Insurance Portability and Accountability Act (HIPAA) or other privacy laws, but unfortunately, that is not the case. No U.S. privacy law covers the data collected under these pharmacy customer portals.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹⁹ Every state and the District of Columbia have similarly adopted laws that prohibit at least some categories of unfair or deceptive practices (UDAP laws),²⁰ many of which are based

¹¹ *Id.*

¹² *Id.*

¹³ Sara Morrison, *You Got a Vaccine. Walgreens Got Your Data.*, Vox (Mar. 4, 2021), <https://www.vox.com/recode/22310281/covid-vaccine-walgreens-cvs-rite-aid-walmart-data> (“Walmart... offers patients the ability to opt out of receiving marketing emails when they register[.]”).

¹⁴ Terlep, *supra* note 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 15 U.S.C. § 45(a)(1).

²⁰ Carolyn Carter, *Consumer Protection in the States: a 50-State Evaluation of Unfair and Deceptive Practices Laws*, Nat’l Consumer Law Ctr. 10 (Mar. 2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf>

on the FTC Act.²¹ The above-described practices violate the Massachusetts Consumer Protection Law.²² Pharmacies that collect personal data for marketing purposes from those seeking to obtain the COVID-19 vaccine deprive patients of control over their own personal data.²³ Patients have no meaningful opportunity to avoid this data collection and associated marketing if they wish to receive a life-saving vaccine. There are no benefits to consumers that might outweigh the significant privacy harms suffered by patients receiving vaccinations through the pharmacies in question. In fact, these practices carry a risk of impeding vaccine distribution by discouraging people from seeking out the vaccine. Pharmacies may not exploit the public health necessity of the COVID-19 vaccine by forcibly subjecting patients to data collection and marketing.

Pharmacies are responsible for providing life-saving vaccines to millions of Americans. And during this emergency, pharmacies should not be deploying systems that make vaccine access contingent on registration for unrelated commercial pharmacy services or the collection of personal data for unrelated purposes. We encourage your office to require that pharmacies in Massachusetts halt the practice of using the personal information collected from COVID vaccine recipients for secondary purposes. Pharmacies should not further hinder the vaccine distribution by engaging in unfair or deceptive practices that will lead to greater public mistrust of the vaccine and less accessibility. The vaccine should be accessible to all qualified patients without a barrier that collects unnecessary data about patients for marketing purposes.

Pharmacies' collection of personal data from vaccine recipients also poses special risks for marginalized populations. We are concerned that data collection will create an additional barrier to vaccine access and exacerbate existing racial and ethnic disparities in distribution rates.²⁴ Further, the exploitation of personal data causes disproportionate harms to communities of color.²⁵ Pharmacies should not be permitted to collect and use personal data in ways that will

(“States worked from several different model laws, all of which adopted at least some features of the FTC Act by prohibiting at least some categories of unfair or deceptive practices. But all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all now also provide remedies that consumers who were cheated can invoke.”)

²¹ *Id.* at 12.

²² Mass. Gen. Laws Ch. 93A, § 2(a) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

²³ See Anita L. Allen, *The Wanted Gaze: Accountability for Interpersonal Conduct at Work*, 89 *Geo. L.J.* 2013, 2017 (2001) (“Privacy in America can be destroyed by failures to guard against ‘unwanted gazes.’”).

²⁴ See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC (Feb. 12, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html (“There is increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19. Inequities in the social determinants of health, such as poverty and healthcare access, affecting these groups are interrelated and influence a wide range of health and quality-of-life outcomes and risks. To achieve health equity, barriers must be removed so that everyone has a fair opportunity to be as healthy as possible.”); *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, KFF (Mar 31, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/>; Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist — And In Some Cases Worsen*, NPR (Sept. 23, 2020).

²⁵ See *Protecting Consumer Privacy in the Era of Big Data*, House Comm. on Energy & Commerce, 116th Cong. (Feb. 26, 2019) (testimony of Brandi Collins-Dexter, Color of Change),

harm marginalized communities. We urge your office to remove barriers to access the vaccine and promote an equitable vaccine distribution process by protecting the personal data of vaccine recipients.

We ask your office to investigate the collection and use of personal data by CVS and Walgreens from patients seeking the COVID-19 vaccine. The practices of these pharmacies are unfair and unlawful. We seek to promote a robust and effective vaccine distribution program. Accordingly, we urge you to require these pharmacies to:

1. Refrain from automatically enrolling vaccine registrants in any marketing database;
2. Collect and use only the minimum data that is necessary to facilitate administration of the vaccine; and
3. Segregate vaccine registrant data from all commercial and marketing databases.

Sincerely,

Center for Digital Democracy
Common Sense Media
Constitutional Alliance
Consumer Action
Consumer Federation of America
Defending Rights & Dissent
Electronic Privacy Information Center
Media Alliance
The National Workrights Institute
New America's Open Technology Institute
Oakland Privacy
The Parent Coalition for Student Privacy
Privacy Rights Clearinghouse
Privacy Times
Public Citizen
U.S. PIRG

<https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Brandi%20Collins%20Dexter%2002.26.2019.pdf> (“[D]ata security and privacy abuses have disproportionately harmed marginalized communities, especially communities of color.”).

APPENDIX 1

Create your account
For prescriptions, vaccinations, pharmacy, and more healthcare services.

Already have a Walgreens.com account? [Sign in.](#)

If you've shopped or filled a prescription with us before, enter the same information you used earlier.

First name

Last name

Date of birth ?

Phone

Phone type
Cell

Email

Your username will be your email.

Requirements

Password

Minimum 8 characters; at least 1 letter and 1 number; case-sensitive.

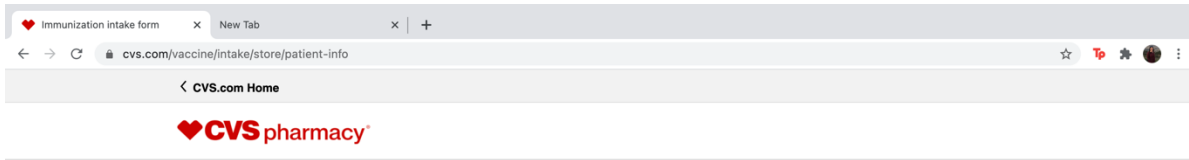
Show password

Security question
Choose security question ?

Security answer

Screen shot of the Online Walgreens platform, which requires a patient to create an account with Walgreens to sign up to receive the COVID-19 vaccine.

APPENDIX 2



i We're now holding your selected time slot. Based on the inventory at your location, you will get a one-dose vaccine and do not need to schedule a second dose. Your vaccine is scheduled to be received at 6990 ATLANTA HWY., AND TAYLOR ROAD, MONTGOMERY AL 36117 on March 9, 2021 at 04:00 PM CST.
[Update appointment](#)

Please provide details

We want to help you spend less time in person, so let's take care of intake details now. We'll ask for your insurance card(s), Social Security number and/or driver's license.

All fields are required, unless marked optional.

Patient information

First name

Last name

Date of birth

Enter without slashes: MMDDYYYY

Age restrictions may vary depending on state and/or vaccine.

Feedback



Sex assigned at birth

Female

Male

How do we use this?

Street address

Unit, apartment, etc (optional)

City

State

Select

ZIP code

Contact information

Contact info will be added to your patient record.

Email address (optional)


Mobile number

Feedback

Immunization intake form x New Tab x | +

cv.s.com/vaccine/intake/store/patient-info

CVS.com Home



Hint: Enter a 10-digit telephone number in the following format: #####-####.

Please see the CVS Pharmacy [Notice of Privacy Practices](#) for more information about how we may use and disclose your Protected Health Information.

By providing your mobile number and e-mail address, you consent to receive a copy of your immunization record as well as other PHI related to the vaccine sent by unencrypted email as well as live or automated calls, text messages and e-mails about this and follow-up visits, insurance and related account information and agree to the [Terms of Use and Privacy Policy](#). Please be aware that e-mail is not a secure method of communication. This means that by choosing to receive protected health information via e-mail, you are accepting the risk that some protected health information could be acquired by someone other than you. If you do not wish to accept this risk, you may call our pharmacy call center to schedule your appointment.

By providing your mobile number, you consent to receive live or automated calls and text messages about this and follow-up visits, insurance and related account information.


We collect data regarding your activity on our webpages throughout your browsing session ("session data") solely for purposes of our own internal analytics and improving your user experience and our products and services. We share your session data with third party service providers for these same purposes. By continuing, you consent to this data collection and sharing.

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Feedback



Screenshots of the Patient Info webpage from CVS, which collects personal information that CVS has said it plans to use to market to patients after they have received COVID-19 vaccines.