II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved FDA collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in 21 CFR 314.50(a) through (f), (i), (h), and (k) and 314.94 have been approved under OMB control number 0910–0001. The collections of information in 21 CFR 314.50(h), 314.53, Form FDA 3542, and Form FDA 3542a, have been approved under OMB control number 0910–0513.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: May 26, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–11682 Filed 5–29–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1127]

Listing of Patent Information in the Orange Book; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the establishment of a docket to solicit comments on the listing of patent information in the FDA publication, ''Approved Drug Products With Therapeutic Equivalence Evaluations'' (commonly known as the ''Orange Book''). We are soliciting comments on the types of patents currently listed in the Orange Book and the impact that any change to current patent listing practices may have on drug product development. This notice is not intended to communicate our regulatory expectations on these issues but is instead intended to seek early input from the public to inform further regulatory action if determined to be appropriate.

DATES: Submit either electronic or written comments by August 31, 2020.

ADDRESSES: FDA is establishing a docket for public comments on this document. The docket number is Docket No. FDA–2020–N–1127. The docket will close on August 31, 2020. Submit either electronic or written comments by that date. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before August 31, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of August 31, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–1127 for ''Listing of Patent Information in the Orange Book.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Elizabeth Giaquinto Friedman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1670, Silver Spring, MD 20993, 240–402–7930, *Elizabeth.Giaquinto@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. The Orange Book

On May 31, 1978, the FDA Commissioner sent a letter to officials of each state, in response to requests from State health agencies for FDA assistance in administering their laws relating to substitution of drug products, announcing FDA's intent to provide a list of all prescription drug products that had been approved by FDA for safety and effectiveness, along with therapeutic equivalence determinations for multisource prescription products. This list was distributed as a proposal in January 1979 (see 44 FR 2932, January 12, 1979). The proposed list, which later became known as the Orange Book, included only prescription drug products that had been approved by FDA and were marketed at the time of publication. On October 31, 1980, FDA published a final version of the list, which was the first Orange Book (45 FR 72582).

On September 24, 1984, the President signed into law the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (Hatch-Waxman Amendments). The Hatch-Waxman Amendments require that FDA, among other things, make publicly available a list of approved drug products with monthly supplements. The Orange Book and its monthly Cumulative Supplements satisfy this requirement.

The Orange Book identifies drug products approved on the basis of safety and effectiveness by FDA under the Federal Food, Drug, and Cosmetic Act (FD&C Act). The main criterion for the inclusion of a product is that it has a new drug application (NDA) or abbreviated new drug application (ANDA) that has been approved and that has not been withdrawn for safety or efficacy reasons.

B. Submission and Listing of Patent Information

The FD&C Act establishes requirements for FDA, NDA applicants, and NDA holders related to submission of patent information and the listing of patent information in the Orange Book. The FD&C Act requires NDA applicants to file with their application the patent number and expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug (see section 505(b)(1) of the FD&C Act; see also 21 CFR 314.53). An NDA applicant is required to amend its application to include this information if a patent that claims such drug or a method of using such drug is issued after the filing date but before approval of the application. After approval of an NDA (including certain types of supplements to an NDA) but within certain time frames prescribed in the FD&C Act and FDA's implementing regulations, NDA holders must submit the required information on any patent that claims the approved drug or an approved method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug, including information on patents that are issued after the application is approved (see section 505(c)(2) of the FD&C Act (21 U.S.C. 355(c)(2)) and 21 CFR 314.53). The FD&C Act requires FDA to regularly revise the Orange Book to include, among other things, patent information submitted under section 505(b)(1) or 505(c)(2) of the FD&C Act (see section 505(j)(7)(A)(iii) of the FD&C Act). We note that FDA has a ministerial role with regard to the listing of patent information (see, *e.g.,* ''Applications for FDA Approval to Market a New Drug: Patent Submission and Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not be Infringed,'' final rule, 68 FR 36676 at 36683 (June 18, 2003)) (Indeed, the requirement of prompt publication (''upon submission''), combined with the 30-day timeframe for updating the Orange Book, are strong evidence that Congress did not intend us to undertake anything other than a ministerial action.)). Since enactment of the Hatch-Waxman Amendments, FDA has provided recommendations and issued regulations pertaining to patent listing requirements of the FD&C Act to facilitate implementation. Below is a brief summary of those efforts.

Following the enactment of the Hatch-Waxman Amendments, FDA provided NDA applicants and application holders with advice on how to comply with these new amendments, including the new requirements for submission of patent information, via letters to industry (see, *e.g.,* Letter from Harry M. Meyer, Jr., M.D. to the Pharmaceutical Manufacturers Association (March 26, 1985), available at *https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM072884.pdf*). These letters demonstrated how FDA's thinking on the appropriateness of the listing of certain patents evolved, even after a short period following the implementation of the Hatch-Waxman Amendment's patent information submission requirements. For example, shortly after enactment the Agency indicated that formulation patents were not covered by the FD&C Act and therefore should not be submitted for listing in the Orange Book. However, in 1985, the Director of the Center for Drugs and Biologics issued a letter to industry stating, in part, that FDA reconsidered its original position and that FDA now intends to publish composition patents, including formulation patents, claiming the drug for which the NDA was submitted and for which a claim of patent infringement could reasonably be asserted in the event of unlicensed manufacture, use, or sale of the drug.

In 1989, FDA issued a proposed rule to implement the Hatch-Waxman Amendments, including proposed regulations detailing the types of patents that FDA regarded as covered by the requirements in section 505(b)(1) and 505(c)(2) of the FD&C Act. In particular, FDA proposed that to comply with section 505(b)(1) and 505(c)(2) of the FD&C Act, NDA applicants would be required to submit information on drug (ingredient) patents, drug product (formulation and composition) patents, and method-of-use patents (see ''Abbreviated New Drug Application Regulations,'' proposed rule, 54 FR 28872 at 28918 (July 10, 1989)). The proposed rule, though, specifically excluded process patents. When FDA issued a final rule in 1992, FDA declined to finalize those requirements, and stated that because the Agency would be issuing final regulations governing patent certification and marketing exclusivity requirements at a future date, FDA was revising or deleting cross-references to those provisions and, where possible, replacing them with statutory citations (see ''Abbreviated New Drug Application Regulations,'' final rule, 57 FR 17950 at 17951 (April 28, 1992)). In 1994, FDA finalized the regulations governing certain patent and exclusivity provisions of the Hatch-Waxman Amendments (see ''Abbreviated New Drug Application Regulations; Patent and Exclusivity Provisions,'' final rule, 59 FR 50338 (October 3, 1994)). In response to a comment suggesting proposed revisions to the regulations to

clarify that submission of patent information on patented manufacturing processes is not appropriate, the preamble to the final rule reiterated that the regulation at § 314.53(b) clearly states that information on process patents should not be submitted to FDA (59 FR 50338 at 50345).

In 2002, FDA issued a proposed rule in response to: (1) Disputes over whether certain listed patents met the regulatory requirements for listing in the Orange Book and (2) a request from the Federal Trade Commission to issue a regulation or guidance clarifying whether an NDA holder can list various types of patents in the Orange Book (see ''Applications for FDA Approval to Market a New Drug: Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not be Infringed,'' proposed rule, 67 FR 65448 at 65449 (October 24, 2002)). The proposed rule addressed: (1) The types of patents that must and must not be listed, including, among others, certain patents that claim methods of use; (2) the patent certification statement that NDA applicants must submit as part of an NDA or a supplement to an NDA; and (3) the 30-month stay of approval for a 505(b)(2) application or an ANDA set out in the Hatch-Waxman Amendments (see also section 505(c)(3)(C) and 505(j)(5)(B)(iii) of the FD&C Act). In addition to proposing to clarify that NDA holders and NDA applicants must not submit information on patents that claim methods of use that are not approved for the listed drug or are not the subject of the pending application, respectively, the proposed regulation at § 314.53(a) proposed to prohibit the listing of information on patents claiming packaging, patents claiming metabolites, and patents claiming intermediates (67 FR 65448 at 65451). The proposed rule, however, proposed to require NDA applicants and NDA holders to submit information on product-by-process patents (*i.e.,* patents that claim a product by using or listing process steps to wholly or partially define the claimed product) and patents that claim a drug substance even when the patented drug substance was a different form than the drug substance that is the subject of the pending or approved NDA as long as the drug substances are the same (67 FR 65448 at 65452).

FDA issued the final rule on patent listing requirements, with certain revisions, on June 18, 2003. The final rule revised FDA's regulations to: (1) Incorporate the proposals described above with certain revisions; (2) prohibit the submission of patents claiming packaging, intermediates, or metabolites; (3) require the submission of certain patents claiming a different polymorphic form of the active ingredient described in the NDA; and (4) add a requirement that for submission of polymorph patents, the NDA holder must have test data demonstrating that a drug product containing the polymorph will perform the same as the drug product described in the NDA (see 68 FR 36676 at 36677). We also note that certain sections of the June 2003 final rule were superseded by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) and subsequently revoked (see ''Application of 30-Month Stays on Approval of ANDAs and Certain NDAs Containing a Certification That a Patent Claiming the Drug Is Invalid or Will Not Be Infringed; Technical Amendment'' (69 FR 11309 (March 10, 2004)). The preamble to the final rule addressed comments on the types of patents that must and must not be submitted, including comments stating that patents claiming devices or containers that are 'integral' to the drug product or require prior FDA approval should be submitted and listed (68 FR 36676 at 36680). The comments described a distinction between packaging and devices such as metered dose inhalers and transdermal patches, which are drug delivery systems used and approved in combination with a drug. In response to the comment, FDA agreed that patents claiming a package or container must not be submitted, and clarified that such packaging and containers are distinct from the drug product and thus fall outside of the requirements for patent submission (68 FR 36676 at 36680). FDA did not expressly address device-related patents, but clarified the rule to require submission of patents that claim the drug product as defined in FDA's regulation at § 314.3(b), which defines *drug product* as a finished dosage form, *e.g.,* tablet, capsule, or solution, that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients. FDA explained that the ''key factor'' in determining whether the patent must or must not be submitted for listing is whether the patent claims the finished dosage form of the approved drug product. Patents must not be submitted for bottles or containers and other packaging, as these are not 'dosage forms' (68 FR 36676 at 36680).

In 2015, FDA proposed regulations to implement portions of Title XI of the MMA, which amended provisions of the FD&C Act that govern the approval of 505(b)(2) applications and ANDAs, and FDA also proposed to amend certain regulations, including regulations regarding the submission of patent information, to facilitate compliance with and efficient enforcement of the FD&C Act (''Abbreviated New Drug Applications and 505(b)(2) Applications,'' proposed rule, 80 FR 6802 (February 6, 2015)). Among other things, the final rule, issued in 2016, revised and streamlined the requirements for submission of patent information on: (1) Patents that claim the drug substance and/or drug product and meet the requirements for patent listing on that basis; (2) drug substance patents that claim only a polymorph of the active ingredient; and (3) certain NDA supplements (''Abbreviated New Drug Applications and 505(b)(2) Applications; Final Rule,'' 81 FR 69580 (October 6, 2016)) (MMA Final Rule). For example, FDA clarified that an applicant need only satisfy the requirements for patent listing set forth in section 505(b)(1) and (c)(2) of the FD&C Act and, subject to the requirements for submission of method-of-use patent information, need not identify each basis on which the patent claims the drug (see 81 FR 69580 at 69596). Accordingly, if a patent is eligible for listing as claiming both the drug substance and the drug product, an applicant would only be required to identify one of these two bases for listing (see § 314.53(c)(2)(i)(S) and (c)(2)(ii)(T)). The MMA final rule also codified FDA's longstanding position that the NDA holder's description of the patented method of use required for publication must contain adequate information to assist 505(b)(2) and ANDA applicants in determining whether a listed method-of-use patent claims a use for which the 505(b)(2) or ANDA applicant is not seeking approval (see § 314.53(c)(2)(ii)(P)(3)). For example, the rule requires that if the method(s) of use claimed by the patent does not cover an indication or other approved condition of use in its entirety, then the applicant must describe only the specific approved method of use claimed by the patent for which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner of the patent engaged in the manufacture, use, or sale of the drug product (see § 314.53(c)(2)(ii)(P)(3)).

C. Patent Certifications and Exclusivities—Timing of Approval of 505(b)(2) Applications and ANDAs

The timing of approval for a 505(b)(2) application and an ANDA (including a

petitioned ANDA) is subject to certain patent and marketing exclusivity protections.

A 505(b)(2) application and ANDA must include an appropriate patent certification or statement for each patent that claims the listed drug(s) relied upon or the reference listed drug (RLD), respectively, or a method of using such drug and for which information is required to be filed under section 505(b) or 505(c) of the FD&C Act. The 505(b)(2) or ANDA applicant must submit one or more of the following certifications or statements:

- That such patent information has not been filed (a paragraph I certification);
- that such patent has expired (a paragraph II certification);
- the date on which such patent will expire (a paragraph III certification);
- that such patent is invalid, unenforceable, or will not be infringed by the manufacture, use, or sale of the drug product for which the 505(b)(2) application or ANDA is submitted (a paragraph IV certification);
- that there are no patents that claim the listed drug(s) or that claim a use of such drug (a ''no relevant patents'' statement, which is submitted instead of a patent certification); or
- that a method-of-use patent does not claim a use for which the 505(b)(2) or ANDA applicant is seeking approval (a 505(b)(2)(B) or (j)(2)(A)(viii) statement).

An applicant that submits a paragraph IV certification is required to give notice of the paragraph IV certification to the NDA holder for the listed drug(s) relied upon or RLD and each owner of the patent that is the subject of the certification. Notice of a paragraph IV certification subjects the 505(b)(2) or ANDA applicant to the risk that it will be sued for patent infringement. If the NDA holder or patent owner initiates a patent infringement action within 45 days after receiving notice of the paragraph IV certification, there generally will be a statutory 30-month stay of approval of the 505(b)(2) application or ANDA while the patent infringement litigation is pending (see section 505(c)(3)(C) and (j)(5)(B)(iii) of the FD&C Act).

If a patent is timely listed in the Orange Book after a 505(b)(2) application or ANDA is submitted but before it is approved, the applicant generally must amend its application and provide an appropriate patent certification or statement to the newly listed patent, but a 30-month stay of approval will not be available (see section 505(c)(3)(C) and 505(j)(5)(B)(iii) of the FD&C Act).

D. ANDAs Subject to Risk Evaluation and Mitigation Strategies

The Food and Drug Administration Amendments Act of 2007 (FDAAA) (Pub. L. 110–85) created section 505–1 of the FD&C Act (21 U.S.C. 355–1), which authorizes FDA to require a risk evaluation and mitigation strategy (REMS) if FDA determines that a REMS is necessary to ensure that the benefits of the drug outweigh its risks. A REMS is a required risk management strategy that employs tools beyond prescribing information to ensure that the benefits of a drug outweigh its risks. A REMS may require a Medication Guide to provide risk information to patients (see section 505–1(e)(2) of the FD&C Act) and/or a communication plan to disseminate risk information to health care providers (see section 505–1(e)(3) of the FD&C Act). FDA may also require certain elements to assure safe use (ETASU) when such elements are necessary to mitigate specific serious risks associated with a drug (see section 505–1(f) of the FD&C Act). ETASU may include, for example, requirements that health care providers who prescribe the drug have particular training or experience, that patients using the drug be monitored, or that the drug be dispensed to patients with evidence or other documentation of safe-use conditions. An ANDA referencing a drug with a REMS with ETASU is subject to the same ETASU as its RLD. When a REMS with ETASU is required for the RLD, section 505–1(i)(1)(C) of the FD&C Act, as amended by the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), requires that the holder of an ANDA approved under section 505(j) of the FD&C Act use a ''single, shared system'' with the RLD holder for the ETASU, or a ''different, comparable aspect'' of the ETASU. FDA is aware that some NDA holders have obtained patents claiming the way one or more of their REMS requirements have been implemented and that this can impact the ability of a prospective generic applicant to form a single, shared system with the NDA holder. The prospect of NDA holders obtaining patents for REMS was also contemplated by Congress in FDAAA, which, prior to the amendments made to section 505–1 of the FD&C Act by the Further Consolidated Appropriations Act, 2020, required the RLD and ANDA holders to use a single, shared system for the ETASU unless FDA waived the requirement, and provided that one of the grounds for which FDA could waive the single, shared system requirement is if an aspect of the ETASU were claimed by a patent and the ANDA applicant certified that it sought a license to that aspect and was unable to obtain one (see 21 U.S.C. 355–1(i)(1)(B)(ii), 2012 ed.). We note that section 505–1(f)(8) of the FD&C Act provides that no holder of an approved covered application shall use any ETASU to block or delay approval of an application under section 505(b)(2) or (j) of the FD&C Act or to prevent application of such element to a drug that is the subject of an ANDA.

II. Issues for Consideration and Request for Comments

Stakeholders have requested clarification on whether certain types of patents fall within the scope of required patent information that must be submitted for listing in the Orange Book (see, *e.g.,* Docket Nos. FDA–2005–A–0476, FDA–2006–A–0063, FDA–2007–A–0099, FDA–2011–A–0363, FDA–2012–A–1169), and FDA is aware that some NDA holders have submitted patents for listing in the Orange Book, including certain types of device-related patents and REMS-related patents, for which there may be uncertainty regarding whether these are in fact the type of patents that must be submitted. Stakeholders also have informed FDA that there are both benefits and challenges to the listing of certain types of patent information in the Orange Book as well as to the omission of potentially relevant patent information from the Orange Book. For example, the listing of a patent provides NDA holders with the opportunity to identify which patents in the categories described in the FD&C Act apply to its approved drug products. Patent listing can help 505(b)(2) and ANDA applicants assess the intellectual property assertions related to an NDA holder's product that could potentially block entry of their proposed follow-on drug product or generic drug product and determine their approach to these patents. Patent listing also provides 505(b)(2) and ANDA applicants the opportunity to challenge a patent while their applications are still under review by the Agency, so that such claims can be litigated prior to commercial marketing of the follow-on or generic drug product. However, this also creates the possibility of a stay of approval of the 505(b)(2) application or ANDA and implicates other statutory procedures and requirements under the Hatch-Waxman framework.

In light of these and other considerations, as part of an Agency-wide effort to modernize the Orange Book, we are examining whether FDA should further evaluate or provide additional clarity regarding the types of patent information listed in the Orange

Book. In particular, we are seeking comments on the following as they relate to the submission of patent information under section 505 of the FD&C Act and the listing of such patent information in the Orange Book: The listing of patents that claim a device constituent part of a combination product approved under section 505 of the FD&C Act (*e.g.,* a drug delivery device); the listing of patents that claim a device whose use is referenced in approved drug labeling; the listing of patents associated with an established REMS; and the listing of patents associated with digital applications (*e.g.,* clinical decision support software, software as a medical device). We note that the questions posed below are not meant to be exhaustive and we are interested in any other pertinent information that stakeholders and any other interested parties would like to provide on the types of patent information that should be included in the Orange Book.

A. General Questions

1. Do 505(b)(2) and ANDA applicants currently encounter any challenges because certain types or categories of patents are not listed in FDA's Orange Book?

2. Given the general increasing complexity of products approved in an NDA (*e.g.,* drug-device combination products, complex delivery systems, associated digital applications), are there any aspects of FDA's interpretation of the statutory requirement for NDA holders to submit information on a patent that claims the drug or a method of using such drug that are not sufficiently clear? If there is a lack of clarity, how could this be resolved?

3. How would NDA holders and prospective 505(b)(2) and ANDA applicants weigh any advantages that may result from listing of additional types or categories of patent in the Orange Book against the potential need to submit additional patent certifications that could result in a delay of approval of a 505(b)(2) application or ANDA?

4. If you think FDA should clarify the type of patents that must be listed in the Orange Book, what factors should FDA consider in implementing this clarification? For example, should FDA consider specific factors in evaluating the timeliness of patent information submitted after such clarification?

5. Are there other issues related to the listing of patent information that we should consider?

B. Drug Product Patents

1. Are there elements of FDA's regulatory definition of *drug product* or *dosage form* in § 314.3(b) that may be helpful to clarify to assist NDA holders in determining whether a patent claims the finished dosage form of an approved drug product?

2. What factors should FDA consider in providing any clarifications related to whether device-related patents need to be submitted for listing as a patent that claims the drug? For example, what are the advantages and disadvantages of requiring patents that claim a device constituent part of a combination product approved under section 505 of the FD&C Act to also claim and/or disclose the active ingredient or formulation of the approved drug product (or the drug product class) to fall within the type of patent information that is required to be submitted to FDA for listing in the Orange Book? Also, how, if at all, should this analysis be affected by considerations about whether the device or specific component of device claimed in the patent is ''integral'' (see 68 FR 36676 at 36680) to the administration of the drug?

C. Method-of-Use Patents

1. What information should FDA consider regarding when a patent that claims a method of using a device constituent part, or only a component of a device constituent part, might or might not meet the statutory standard for submission by the NDA holder for listing in the Orange Book as a method-of-use patent? Should FDA consider whether: (1) The patent claims and/or discloses the active ingredient or formulation of the approved drug product (or the drug product class)?; (2) the device constituent part is described in certain sections of the listed drug labeling?; or (3) use of the device is described in labeling for the listed drug, but the device is not a constituent part of the drug product? Should FDA consider whether the drug product labeling states that the drug is only for use with the specific device? Should FDA also consider device labeling, for example whether the device labeling indicates the device is for use with the specific drug?

2. What information should FDA consider regarding whether there are circumstances in which a patent claiming the way an approved drug product is administered would meet the statutory standard for submission by the NDA holder for listing in the Orange Book as a drug product patent rather than a method-of-use patent?

3. What information should FDA consider regarding whether there are circumstances in which a method-of-use patent claiming the way an approved drug product is administered that is not described in FDA-approved product labeling would meet the statutory standard for listing in the Orange Book?

D. REMS-Related Patents

1. What information should FDA consider regarding whether patents that claim how the sponsor has implemented a particular REMS requirement meet the statutory requirement for the type of patent information that is required to be submitted to FDA for listing in the Orange Book? What factors should be considered in making this determination?

2. Are there other issues related to patents that claim how the sponsor has implemented a particular REMS requirement that FDA should consider with regard to listing patent information in the Orange Book, including any potential impact listing such patents in the Orange Book could have on development of REMS for generic versions of products? For example, does listing patent information in the Orange Book for such patents pose difficulties for ANDA applicants in developing a single, shared system REMS for that product?

E. Patents for Digital Applications

1. If an approved drug product has an associated digital application (*e.g.,* a mobile application that accepts and records information from an ingestible sensor in a drug product), what factors should be considered in determining whether a patent that claims an aspect of that digital application meets the standards for listing in the Orange Book?

2. Are there other issues related to patents for digital applications associated with approved drugs that should be considered with regard to listing patent information in the Orange Book?

Dated: May 26, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–11684 Filed 5–29–20; 8:45 am]

BILLING CODE 4164–01–P