



## DEPARTMENT OF JUSTICE

### 28 CFR Part 95

[Docket No. OAG 182; AG Order No. 6144-2025]

RIN 1105–AB70

### Homicide Victims’ Families’ Rights Act

**AGENCY:** Office of the Attorney General, Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Justice is proposing a rule to implement the Homicide Victims’ Families’ Rights Act of 2021. The proposed rule would explain and effectuate the Act’s system for reviewing and, as warranted, reinvestigating murders investigated by Federal law enforcement agencies that remain unsolved after three years.

**DATES:** Written and electronic comments must be sent or submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments received by mail will be considered timely if they are postmarked on or before the last day of the comment period. The electronic Federal Docket Management System will accept electronic comments until midnight eastern time at the end of that day.

**ADDRESSES:** Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Room 4234, Washington, DC 20530. To ensure proper handling, please reference RIN 1105–AB70 or Docket No. OAG 182 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** David J. Karp, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Washington, DC, 202–514–3273.

**SUPPLEMENTARY INFORMATION:**

## **I. Public Participation**

Posting of Public Comments. Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via one of the methods and by the deadline stated above. The Department of Justice (“Department”) also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at <http://www.regulations.gov>. Such information includes personally identifying information (“PII”) (such as your name, address, etc.).

Interested persons are not required to submit their PII in order to comment on this rule. However, any PII that is submitted is subject to being posted to the publicly accessible website at <http://www.regulations.gov> without redaction.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Confidential business information identified and located as set forth above will not be placed in the public docket file. The Department may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>. To inspect the agency’s public docket file in person, you

must make an appointment with the agency. Please see the “**FOR FURTHER INFORMATION CONTACT**” paragraph above for agency contact information.

## **II. Overview**

The Homicide Victims’ Families’ Rights Act of 2021 (“Act” or “HVFRA”), which was enacted on August 3, 2022, Public Law 117-164, 136 Stat. 1358, provides a system for the review of case files, and for carrying out further investigation as warranted, in murder cases investigated by Federal law enforcement agencies that have gone unsolved for over three years. The general objective of the Act is to facilitate the identification of the perpetrators of these “cold case” murders and thereby help to bring the perpetrators to justice and provide closure for the victims’ families.

The Act specifically provides for carrying out case file reviews in cold case murder investigations on application by certain family members of the victim, and for further investigation if the case file review concludes that a full reinvestigation would result in probative investigative leads. The Act also directs the collection and publication of statistics on the number of cold case murders and reports to the House and Senate Judiciary Committees on the operation and results of the system established by the Act.

This proposed rule would add a new part 95 to title 28 of the Code of Federal Regulations to implement the Act. The new part would explain the Act’s requirements and key concepts, and it would specify assignments of responsibility and procedures to ensure that the Act is effectively carried out.

## **III. Legal Authority**

The Department of Justice is issuing this rule pursuant to the HVFRA and the authority of the Attorney General under Executive Order 11396, 33 FR 2689 (Feb. 7, 1968).

## **IV. Section-by-Section Analysis**

The proposed rule would provide a statement of purpose in § 95.1 and define key terms in § 95.2. Section 95.3 would explain what is required in cold case murder file reviews. Section

95.4 would set out procedures for victims' family members to apply for file reviews and for action on the applications by the responsible investigative agencies. Section 95.5 would explain the Act's requirements relating to full reinvestigations. Section 95.6 would direct that case file reviews and reinvestigations be carried out in a cohesive manner when multiple agencies are involved. Section 95.7 would address consulting with and informing applicants, and keeping them up to date about case file reviews and reinvestigations. Section 95.8 would articulate the Act's timing rules for successive applications. Sections 95.9, 95.10, and 95.11 would address the Act's requirements relating to compliance, data collection, and annual reports. Section 95.12 would incorporate a provision of the Act that allows the withholding of information whose disclosure would have serious adverse effects or be unlawful. More detailed descriptions of these provisions follow.

*A. Section 95.1—Purpose*

The Act creates a system for reviewing and, as warranted, reinvestigating murder cases previously investigated by Federal agencies in which “all probative investigative leads have been exhausted” and “no likely perpetrator has been identified” after three years, HVFRA 12(6), upon application by certain persons. Section 95.1 would state this general purpose of the Act in terms similar to the Act's full title (“To provide for a system for reviewing the case files of cold case murders at the instance of certain persons, and for other purposes.”).

*B. Section 95.2—Definitions*

1. Paragraph (a)—Designated person

Section 95.2(a) would define “designated person” for purposes of the Act, which refers to the class of individuals who may apply for cold case murder reviews. Section 12(1) and (2) of the Act state that the term includes an “immediate family member,” defined to mean a parent, parent-in-law, grandparent, grandparent-in-law, sibling, spouse, child, or step-child of a murder victim, and “someone similarly situated” to an immediate family member, “as defined by the Attorney General.” While the express statutory definition of immediate family member includes

a parent, child, or step-child, it does not include a step-parent. Pursuant to the Attorney General's authority under section 12(1) of the Act, § 95.2(a) would define "designated person" to include a step-parent, as a person "similarly situated" to a parent, in addition to immediate family members as defined in the statute.

## 2. Paragraph (b)—Victim

Section 95.2(b) of the proposed rule, as provided in section 12(3) of the Act, would define "victim" to mean a natural person who died as a result of a cold case murder.

## 3. Paragraph (c)—Murder

Section 95.2(c) of the proposed rule would implement section 12(4) of the Act, which defines "murder" to mean "any criminal offense under section 1111(a) of title 18, United States Code, or any offense the elements of which are substantially identical to such section."

Section 1111 of title 18 of the United States Code is the Federal murder offense that applies directly in cases arising in the special maritime and territorial jurisdiction of the United States, which includes Federal lands and facilities as provided in 18 U.S.C. 7(3). The first sentence of section 1111(a) defines "murder" as "the unlawful killing of a human being with malice aforethought." Malice aforethought is generally understood to mean killing a person intentionally, knowingly, or with extreme recklessness, albeit with variations in the verbal formulas that courts use to explicate the concept. *See, e.g., United States v. Begay*, 33 F.4th 1081, 1091 (9th Cir. 2022). The second sentence of section 1111 specifies that certain types of murder are first-degree murder, including premeditated murders and murders committed in the course of other specified offenses. The list of predicate offenses for this purpose includes "arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, [and] robbery." Courts have interpreted the sentence in conformity with the traditional felony-murder doctrine, which categorically treats the specified offenses as involving murder if someone dies during the commission of the offense, without requiring any particular culpability of the offender with respect to resulting death. *See, e.g.,*

*United States v. Garcia Ortiz*, 528 F.3d 74, 80-81 (1st Cir. 2008); *United States v. Tham*, 118 F.3d 1501, 1508 (11th Cir. 1997).

The inclusion of “any criminal offense under section 1111(a) of title 18” in the definition of murder in section 12(4) of the Act broadly brings within the scope of the Act murders committed on Federal lands, such as national parks and military bases. The proposed rule would parallel the statutory inclusion of murders that directly violate 18 U.S.C. 1111 by providing in the first sentence of § 95.2(c)(1) that murder “means an offense under 18 U.S.C. 1111.”

The second clause of the statutory definition of “murder” in section 12(4) of the Act refers to offenses whose elements are “substantially identical” to section 1111(a). The first sentence of paragraph (c)(1) in § 95.2 of the proposed rule would interpret this to mean other Federal offenses “that incorporate[] by reference the elements of 18 U.S.C. 1111.” This interpretation understands the “substantially identical” language in section 12(4) of the Act to include offenses whose substantive elements are identical to elements of the substantive offense defined in 18 U.S.C. 1111(a), regardless of differences in jurisdictional elements. For example, the offense of murdering a Federal officer, in violation of 18 U.S.C. 1114(1), is within the scope of the HVFRA, although the basis for jurisdiction under 18 U.S.C. 1114 (Federal officer victim) is different from the basis for jurisdiction under 18 U.S.C. 1111 (special maritime and territorial jurisdiction).

The requirement of substantial identity to 18 U.S.C. 1111 is satisfied by, and only by, offenses that appropriate the elements of section 1111 by cross-reference. Other Federal homicidal offenses (except those cross-referencing section 1111) define their elements in varying ways—*see, e.g.*, 18 U.S.C. 1112 (manslaughter); 21 U.S.C. 841(b) (up to life imprisonment for drug trafficking if death results from use of controlled substance)—but they are not defined to be the killing of a human being with malice aforethought as that concept is understood in section 1111. The offenses identified in § 95.2(c)(1), all of which incorporate by reference the elements

of section 1111, provide a comprehensive compilation of the Federal offenses whose substantive elements match those of section 1111.

Offenses can incorporate by reference the elements of 18 U.S.C. 1111, and hence be “substantially identical” to section 1111, in three ways—by expressly cross-referencing section 1111, *e.g.*, 18 U.S.C. 1114(1); by referring to “murder” without further definition, which is understood to mean murder as defined in 18 U.S.C. 1111(a), *e.g.*, 18 U.S.C. 1153; *see United States v. Antelope*, 430 U.S. 641, 642-43, 647-48 & n.9 (1977); or by referencing a broader class of crimes that includes 18 U.S.C. 1111, *e.g.*, 18 U.S.C. 1152. Regardless of the particular way in which an offense incorporates by reference the elements of 18 U.S.C. 1111, offenses that satisfy this criterion are within the scope of the HVFRA.

The initial language in § 95.2(c)(1) includes “an offense under 18 U.S.C. 1111.” This encompasses murders committed in the special maritime and territorial jurisdiction of the United States, *see* 18 U.S.C. 7, in which section 1111 applies directly.

Section 95.2(c)(1)(i), which refers to 18 U.S.C. 1152 and 1153, confirms the Act’s coverage of Indian country murders. The first paragraph of section 1152 says that Federal criminal laws that apply “in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian Country”—the referenced Federal criminal laws include section 1111(a)—subject to exceptions in the second paragraph, such as offenses committed by Indians against Indians. Section 1153 reaches “major crimes” committed by Indians in Indian country, including “murder,” which is understood to mean murder as defined in section 1111(a). Section 95.2(c)(1)(i) would make the coverage of Indian Country murders explicit.

Section 1114 of title 18 proscribes killings of Federal officers or employees performing their duties, and provides that violators shall be punished “in the case of murder, as provided under section 1111.” Section 1114 through this cross-reference expressly incorporates the elements and penalties of section 1111, satisfying in such cases the Act’s coverage of offenses whose elements are substantially identical to section 1111(a). Section 95.2(c)(1)(ii) would make

the Act's coverage of murders of Federal officers or employees in violation of section 1114 explicit, as well as murders of federally protected persons under several other provisions. The other provisions, and their relevant language and subdivisions that incorporate the elements of section 1111(a) by reference, are:

- 18 U.S.C 115(b)(3) (murder under statute protecting certain Federal officials, former officials, and their immediate family members “shall be punished as provided in section[] 1111”);
- 18 U.S.C. 351(a) (killing of certain high level Federal officials “shall be punished as provided by section[] 1111”);
- 18 U.S.C. 1116(a) (killing of foreign official, official guest, or internationally protected person “shall be punished as provided under section[] 1111”);
- 18 U.S.C. 1121(a) (whoever intentionally kills a person aiding a Federal criminal investigation “shall be sentenced according to the terms of section 1111”);
- 18 U.S.C. 1503(b)(1), 1512(a)(3)(A), 1513(a)(2)(A) (killings under Federal obstruction of justice provisions subject to “the punishment provided in section[] 1111”);
- 18 U.S.C. 1751(a) (killing of President, Vice President, or members of their staffs “shall be punished as provided by section[] 1111”);
- 18 U.S.C. 1841(a), (b)(1) (applying section 1111 to murder of child in utero and applying penalties of section 1111 to intentional killing of child in utero under other specified provisions); and
- 7 U.S.C. 2146(b); 15 U.S.C. 1825(a)(2)(C); 21 U.S.C. 461(c), 675, 1041(b) (killing of persons while engaged in or on account of their performance of official duties under Federal regulatory schemes punishable “as provided under section[ ] 1111”).

Section 1119(b) of title 18, in relevant part, provides that killing by a U.S. national of a U.S. national who is outside the United States but within the jurisdiction of another country “shall be punished as provided under section[] 1111.” Section 2332(a)(1), relating to the context

of terrorist murders of U.S. nationals abroad, provides that “if the killing is murder (as defined in section 1111(a))” the perpetrator shall be “punished by death or imprisonment for any term of years or for life.” Section 95.2(c)(1)(iii) would expressly confirm the Act’s coverage of murder offenses under these provisions, which proscribe killings of U.S. nationals outside of the United States.

Section 95.2(c)(1)(iv) would identify other Federal murder offenses that satisfy the criteria for coverage by the Act. These are:

- 18 U.S.C. 36(b)(2) (providing, in relation to drive-by shootings in the context of major drug offenses, that a killing that is “a first degree murder (as defined in section 1111(a))” is punishable by death or imprisonment for any term of years or life and that “a murder other than a first degree murder (as defined in section 1111(a))” is punishable by imprisonment for any term of years or life);
- 18 U.S.C. 924(j)(1) (providing, in relation to killing with a firearm in a Federal crime of violence or drug trafficking crime, that “if the killing is a murder (as defined in section 1111),” the punishment is death or imprisonment for any term of years or life);
- 18 U.S.C. 930(c) (killings in the course of armed attacks in or on Federal facilities “shall be punished as provided in section[] 1111”);
- 18 U.S.C. 1118 (person serving Federal life term of imprisonment who commits “a first degree or second degree murder (as defined in section 1111)” shall be punished by death or life imprisonment);
- 18 U.S.C. 1120 (killing by person escaped from a Federal correctional institution where he was serving a life term “shall be punished as provided in section[] 1111”);
- 18 U.S.C. 1652 (U.S. citizen pirate who “commits any murder . . . on the high seas . . . shall be imprisoned for life”);
- 18 U.S.C. 1958 (murder for hire punishable by death or life imprisonment);

- 18 U.S.C. 1959(a)(1) (murder in aid of racketeering punishable by death or life imprisonment);
- 18 U.S.C. 2245 (murder in course of sex offenses punishable by death or up to life imprisonment);
- 18 U.S.C. 3261(a) (members of, and persons accompanying, the armed forces who engage in conduct that would constitute a felony if engaged in within the special maritime and territorial jurisdiction of the United States—which includes murder under 18 U.S.C. 1111—shall be punished as provided for that offense);
- 18 U.S.C. 3273(a) (certain Federal personnel stationed or deployed in Canada who engage in conduct that would be federally prosecutable had the conduct occurred within the special maritime and territorial jurisdiction of the United States—which includes murder under 18 U.S.C. 1111—shall be imprisoned as provided for that offense); and
- 49 U.S.C. 46506(1) (individual on an aircraft in the special aircraft jurisdiction of the United States “who commits an act that . . . if committed in the special maritime and territorial jurisdiction of the United States . . . would violate section . . . 1111 . . . shall be . . . imprisoned under that section”).

The proposed rule’s definition of covered “murder” offenses in § 95.2(c)(1) accords with and encompasses the types of offenses that the legislative history specifically references as within the intended scope of the Act. The Act’s sponsor, Rep. Swalwell, stated regarding the Act: “It also assists investigators in homicide cases that serve important underserved communities such as Native Americans on Indian Reservations, Federal law enforcement officers killed in action, U.S. citizens who are murdered abroad, or homicides that take place on Federal land and the high seas.” 168 Cong. Rec. H3877; *see id.* H3876 (remarks of Rep. Bentz) (“The majority of cold cases at issue under this bill are likely to be cases arising from Tribal jurisdictions.”).

In the sponsor’s statement, “homicides that take place on Federal land and the high seas” is a reference to the special maritime and territorial jurisdiction of the United States, *see* 18 U.S.C. 7, in which 18 U.S.C. 1111 applies directly. The prefatory language in § 95.2(c)(1), referring to “an offense under 18 U.S.C. 1111,” includes these cases. “Native Americans on Indian Reservations” in the statement refers to Indian Country cases, which are prosecuted under 18 U.S.C. 1152 and 1153. Section 95.2(c)(1)(i), which refers to 18 U.S.C. 1152 and 1153, confirms the Act’s coverage of Indian country murders. “Federal law enforcement officers killed in action” alludes to murders in violation of 18 U.S.C. 1114, which is included in § 95.2(c)(ii). “U.S. citizens who are murdered abroad” refers to the offenses that proscribe extraterritorial killings of U.S. nationals, 18 U.S.C. 1119 and 2332, which are included in § 95.2(c)(1)(iii).

In addition to clarifying the types of offenses that are “murders” for purposes of the Act, the proposed rule, in § 95.2(c)(2), would identify certain types of offenses that are not covered.

Section 95.2(c)(2)(i) would state that murders in which the victims died before January 1, 1970, are not covered. This provision implements section 11 of the Act, which limits the Act’s applicability to cold case murders occurring on or after January 1, 1970.

Section 95.2(c)(2)(ii) would provide that the scope of the Act and the proposed rule is limited to cases involving murders in violation of Federal law, as opposed to offenses that violate only the laws of a State, the District of Columbia, or a U.S. territory. While Federal agencies may help State and local agencies in the investigation of non-Federal crimes, *see, e.g.*, 28 U.S.C. 540-540B, that does not bring those investigations within the scope of the Act, which is intended to apply “[i]n federal cases.” H. Rep. No. 117-280, at 6; *see* 168 Cong. Rec. H3876 (remarks of Rep. Bentz) (“[T]his bill would only apply to Federal cases of murder, and it wouldn’t apply to murder cases investigated by State and local law enforcement, which are most cases.”). The Act was not intended to supplant the role of State and local law enforcement, which have primary responsibility for the investigation of murders under the laws of their jurisdictions and are best situated to review and reinvestigate cold cases involving those crimes;

rather, the expectation was that the enactment of such a law for Federal cases “will . . . serve as a crucial model for the States to . . . adopt a local Homicide Victims Bill of Rights.” 168 Cong. Rec. H3877 (remarks of Rep. Swalwell).

As a corollary to the limitation to cases involving Federal crimes, case file reviews and reinvestigation are not required in cases in which it has been determined that Federal jurisdiction is lacking. For example, suppose that a witness or informant in a Federal case is killed and the case is initially investigated as a possible retaliatory murder under 18 U.S.C. 1513. Interviews with witnesses to the incident show, however, that the killing resulted from the victim’s provoking a bar fight with a stranger that turned lethal, with no connection to the victim’s involvement in Federal proceedings. Such a case is outside the scope of the Act because it does not involve a murder in violation of Federal law.

More broadly, § 95.2(c)(2)(iii) would provide that the Act’s scope does not include incidents in which there was no murder as defined in § 95.2(c)(1). For example, suppose that a Federal agent is found dead, and the case is initially investigated as a possible murder in violation of 18 U.S.C. 1114 because the agent had been pursuing dangerous criminals who would have reason to kill him. The investigation is closed when a fuller examination of the evidence shows that the agent died of natural causes or because of an accident. Such cases are outside the scope of the Act because its application is limited to murder cases that satisfy certain criteria. *See* HVFRA 12(6).

Conversely, a case may be within the scope of the Act even if it was not initially investigated as a murder. For example, the investigation may begin as a missing person case, in which it is uncertain whether the person is alive or dead. Or it may start as a case involving a fatality, but one in which the known facts are consistent with accidental death, suicide, or involuntary manslaughter. As the case progresses, however, fuller knowledge of the facts and circumstances indicates the commission of a murder as defined in § 95.2(c). If the other

conditions defining a “cold case murder” are also satisfied, *see* HVFRA 12(6), such a case would be subject to the Act.

The definition of “murder” in section 12(4) of the Act, and its construction in § 95.2(c) of the proposed rule, also limit the class of Federal crimes that are subject to the Act. Beyond the statutes identified in § 95.2(c)(1), there are many other provisions of Federal law that define and prescribe penalties for homicidal crimes. For example, 21 U.S.C. 841 prohibits producing or distributing a controlled substance, and it provides for imprisonment between 20 years and life if death results from the use of the controlled substance. Such provisions, though they include parts defining homicidal offenses, are not within the scope of the Act because their elements are not substantially identical to 18 U.S.C. 1111, as required by the statutory and regulatory definition of “murder” for purposes of the Act.

#### 4. Paragraph (d)—Agency

Section 95.2(d) of the proposed rule would track the definition of “agency” in section 12(5) of the Act, which means Federal law enforcement entities with jurisdiction to engage in the detection, investigation, or prosecution of cold case murders. The proposed rule would explain that this definition excludes State and local law enforcement agencies and agencies of the District of Columbia and U.S. territories from the class of agencies subject to the Act.

#### 5. Paragraph (e)—Principal investigative agency

Section 95.2(e) of the proposed rule would define “principal investigative agency” to mean “the federal investigative agency that had the primary responsibility for the initial investigation of a murder.” Section 95.2(e) would exclude a Federal agency from this definition if “a murder was investigated by state or other non-federal authorities and the role of federal agencies was the provision of investigative assistance,” if “a murder was investigated by a federal agency but thereafter state or other non-federal authorities assumed the primary responsibility for the investigation,” or if the Federal agency is a prosecutorial agency of the Department of Justice. The definition would serve three purposes:

First, more than one Federal agency may be involved in the investigation of a murder. The Act presupposes that the case file reviews and reinvestigations it requires will be carried out by the agency that “conducted the initial investigation,” as provided in section 10 of the Act. This is naturally understood to refer to the agency with the lead role in the prior investigation, as opposed to agencies that just assisted or played a peripheral role. The agency with the lead role in the prior investigation logically should be responsible for receiving and acting on applications by family members of the victim for case file reviews. That agency is best situated to carry out such reviews and to undertake further investigation if warranted. The definition of “principal investigative agency” in the proposed rule accordingly would assign these functions to the Federal investigative agency that had the primary responsibility for the initial investigation. If it is unclear which of a number of Federal agencies had primary responsibility—for example, because different agencies had the lead role at different stages in the previous investigation—§ 95.4(c)(1) of the rule would make them jointly responsible for ensuring that the Act’s requirements are carried out.

Second, the proposed rule would make clear that the Federal agencies with responsibilities under the Act are Federal investigative agencies, as opposed to prosecutorial agencies. The prosecution of Federal crimes is carried out by the United States Attorneys’ Offices and by the prosecutorial components of the Justice Department’s litigating divisions, such as the Criminal Division and the National Security Division. Federal prosecutors may be involved to varying degrees at the investigative stage of murder cases within Federal jurisdiction, and they are necessarily involved where there is a need to secure or use legal process in the investigation, such as search warrants or grand jury subpoenas. Nevertheless, the functions required under the Act are properly carried out by investigative agencies rather than prosecutors, and the proposed rule would specify that the Justice Department’s prosecutorial units are not to be considered the principal investigative agency in any case.

Third, in cases in which there is concurrent State and Federal jurisdiction over a murder, both State and Federal authorities may be involved in the investigation. The question then arises whether the investigation was a Federal investigation, which is within the scope of the Act, or a State investigation, which is not. *See* 168 Cong. Rec. H3876 (remarks of Rep. Jackson Lee) (stating that the Act applies “in cases investigated at the Federal level”); *id.* (remarks of Rep. Bentz) (stating that the Act “wouldn’t apply to murder cases investigated by State and local law enforcement”).

The proposed rule’s definition of “principal investigative agency” would provide for Federal agency responsibility where the Federal agency was primarily responsible for the investigation of a murder, but not where the investigation was pursued as a State matter and the role of Federal agencies was limited to providing investigative assistance. Federal law enforcement agencies frequently provide investigative assistance to their State and local counterparts, which may involve such measures as sharing information and intelligence, carrying out forensic testing and analysis, interviewing witnesses, and other collection of evidence and information. Federal legal process may also come into play, complementing and supplementing the capabilities of the responsible State agencies—for example, execution of Federal search warrants or subpoenas in places outside the State agency’s jurisdiction, or at the early stages of an investigation that is ultimately pursued primarily as a State matter. The proposed rule’s definition would make it clear that such measures in the regular conduct of Federal-State cooperation in criminal investigations do not convert State investigations into Federal investigations.

#### 6. Paragraph (f)—Initial investigation

Section 95.2(f) would define “initial investigation” to mean “the investigation of a murder before it became a cold case murder.” This is a technical definition that, in the context of the proposed rule, would assign responsibility for case file reviews and potential reinvestigation of a cold case murder to the agency that previously investigated the murder.

## 7. Paragraph (g)—Cold case murder

Section 95.2(g) would track the definition of “cold case murder” in section 12(6) of the Act. The conditions in the definition are that (i) the time of the murder’s commission (interpreted to mean the time when the victim died) was more than three years prior to the application for case file review, (ii) the murder was previously investigated by a Federal law enforcement entity, (iii) all probative leads have been exhausted, and (iv) no likely perpetrator has been identified. Murders involving multiple perpetrators in which one or more of them have been identified are not within the scope of the Act.

## 8. Paragraph (h)—Probative leads

Section 95.2(h) would define “probative leads” to mean “information that identifies the perpetrator or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency’s judgment and consistent with the agency’s policies and practices regarding the use of investigative methods.” This key concept in the Act determines, among other things, whether the results of a case file review warrant further investigation, and what the objective of a reinvestigation should be. The Act uses this term or similar phrases in a number of places, but with varying wording and without further definition. *See* HVFRA 2(a) (requiring case file review to determine if a full reinvestigation would result in “the identification of probative investigative leads or a likely perpetrator”); *id.* (2)(b)(4) (requiring update of case file using the most current investigative standards to the extent it would “help develop probative leads”); *id.* (2)(c) (requiring certification that “all probative investigative leads have been exhausted or that a likely perpetrator will not be identified”); *id.* 4(a) (requiring reinvestigation if “a full reinvestigation . . . would result in probative investigative leads”); *id.* 4(b) (requiring analysis of all evidence in a reinvestigation “for the purpose of developing probative investigative leads or a likely perpetrator”); *id.* 12(6)(C) (defining “cold case murder” in part as one “for which all probative investigative leads have been exhausted”).

These provisions do not require pursuit of all possible leads, but only those that are “probative.” Determining what leads are “probative,” so as to warrant further investigation, calls for exercises of judgment by the investigative agency. The reference to “probative” leads also raises the question—probative of what?—a matter for which further definition is required to provide clear guidance to investigative agencies in discharging their responsibilities under the Act.

Section 95.2(h) in the proposed rule would provide the needed clarification by defining this term—probative leads—to mean information that identifies the perpetrator, or that provides a sufficient likelihood of enabling the identification of the perpetrator so as to warrant further investigation in the agency’s judgment. The definition is based on the contexts in which the Act uses the term or similar terms and the Act’s general design and purpose to address and solve cases in which “no likely perpetrator has been identified.” HVFRA § 12(6)(D). Variant terminology, “probative investigative leads,” which is used in some provisions of the Act, is understood to have the same meaning.

The proposed rule’s definition of “probative leads” also would specify that the agency’s policies and practices regarding the use of investigative methods must be taken into account—policies and practices that affect whether leads are potentially probative regarding the perpetrator’s identity, as bearing on the reliability of investigative methods and what methods would actually be used in a reinvestigation. In the investigation of murders and other crimes, Federal agencies are guided and constrained by policies and practices that ensure the reliability and effectiveness of the methods utilized in the investigation, and ensure respect for legal norms and the privacy of persons affected by the investigation. These policies and practices apply in reinvestigations under the HVFRA as they do in other investigative contexts. To the extent that a method would not be utilized under the applicable policies and practices, the theoretical possibility of using it is not a positive factor in judging whether further investigation is warranted under the Act.

For example, the legislative history of the Act emphasizes the use of technological improvements to solve cold cases:

Because advances in science progress rapidly, new technology could have been discovered and implemented in the time since detectives last revisited the case. The Office of Justice Programs reports advancements in DNA technology are breathing new life into old, cold, and unsolved criminal cases. Investigators in California used new DNA technology to apprehend the Golden State Killer, a case that had remained cold for decades.

H. Rep. No. 117-280, at 6 (internal quotation marks omitted); *see* 168 Cong. Rec. H3877 (remarks of Rep. Swalwell) (“Improvements in technology . . . will also better equip law enforcement agencies with tools . . . that would assist in identifying new leads . . . to solve crimes”).

As the Committee Report notes, H. Rep. No. 117-280, at 6, the emergence and progressive development of DNA identification technology has revolutionized the investigation of cold cases and has produced remarkable results in innumerable cases. At the same time, the use of DNA methods is subject to policies and practices that promote its sound use and guard against adverse effects. Regular DNA testing in criminal investigations is carried out in conformity with the rules and procedures of the Combined DNA Index System. *See generally Maryland v. King*, 569 U.S. 435, 442-46, 463-66 (2013). The use of forensic genetic genealogy—referenced in the Act’s Committee Report for solving the Golden State Killer case—is subject to policies tailored to its operation and characteristics. *See United States Department of Justice, Interim Policy, Forensic Genetic Genealogical DNA Analysis and Searching* (Nov. 1, 2019).

Thus, in assessing whether further investigation is warranted under the HVFRA, it is not sufficient to note that there is some retained evidence in the case to which an investigative method or technique might in theory be applied. The agency would also need to consider whether and to what extent the relevant investigative method would actually be used in a reinvestigation, consistent with applicable policy and practice, and whether it holds sufficient promise under the facts of the case to warrant further investigation in the agency’s judgment.

For example, if a family member of the victim sought reopening of a cold case murder investigation, based on a novel DNA identification method they read about that has not been scientifically validated, an agency would not be required to act on such a request under the HVFRA if it would not use that unproven method in other investigative contexts.

The same consideration applies in relation to other methods the use of which is restricted or forgone under an agency's general policies and practices. For example, in a cold case murder, a relative of the victim may seek to have the victim's body exhumed for purposes of additional examination or forensic testing. Investigative agencies may not often agree with such requests. Rather, the likelihood that significant new information will be obtained is assessed, and any potential value is balanced against the sensitivity of disinterring the deceased. General policies and practices regarding exhumation need to be taken into account in assessing whether it should be done in a case subject to the HVFRA, as in other investigative contexts.

While the requirement under the Act to pursue "probative leads," as defined in § 95.2(h), pertains only to matters that could facilitate the identification of the perpetrator, this does not limit the authority of any agency to carry out case file reviews or investigate or reinvestigate murder cases for other purposes. As with other aspects of the Act, this proposed rule would only articulate what agencies must do to comply with the Act and would not restrict their ability to go beyond the Act's requirements, on their own initiative or as requested by others. In relation to investigative leads, in particular, agencies are free to review and reinvestigate murder cases for any lawful purpose, such as learning more about the circumstances of a murder or what happened to the victim, regardless of whether the review or reinvestigation may help to identify the perpetrator.

### *C. Section 95.3—Case file review*

Section 95.3 of the proposed rule would implement section 2 of the Act, relating to case file reviews.

Section 95.3(a) of the proposed rule would provide for review of case files upon written application by one designated person, following section 2(a) of the Act.

Section 95.3(b) of the proposed rule would reproduce the required elements of a case file review, as set forth in section 2(b) of the Act, and explain specifically how they should be carried out by reviewers. Paragraphs (1) through (3) of § 95.3(b) would detail the requirements for reviewing what investigative steps may have been missed, whether witnesses should be interviewed or reinterviewed, and whether all appropriate forensic testing and analysis was performed in the first instance or if additional testing may be productive.

Paragraph (4) in § 95.3(b) would resolve ambiguous language in section 2(b)(4) of the Act, which requires that a case file review include “an update of the case file using the most current investigative standards as of the date of the review to the extent it would help develop probative leads.” The initial phrase in this quoted language, “an update of the case file,” might be understood to require technical enhancements of the case file, such as digitizing documents and creating links to other records. The latter language, “using the most current investigative standards as of the date of the review,” would more naturally be understood as requiring consideration of whether reinvestigation in conformity with current investigative standards would help develop probative leads.

Section 95.3(b)(4) of the proposed rule would give weight to the latter language in interpreting section 2(b)(4) of the statute because it is more consistent with the statutory context of case file review to determine whether reinvestigation is warranted, and because an intended aspect of the review would otherwise not be referenced in the statute. The other three paragraphs in section 2(b) of the Act are concerned respectively with whether there were missed steps in the original investigation, whether there were shortfalls in interviewing witnesses, and whether there were shortfalls in forensic testing and analysis. They do not require consideration of whether there were shortfalls in comparison with current investigative standards, though such

consideration should be part of case file review in unsolved murder cases—including in particular Indian country murders—in line with the legislative intent in the HVFRA:

The majority of cold cases at issue under this bill are likely to be cases arising from Tribal jurisdictions . . . . [EO 13898] took steps to try to solve cold cases in Tribal jurisdictions . . . creat[ing] the Operation Lady Justice Task Force . . . . In its first year, this task force opened seven offices across the country to address the number of missing and murdered indigenous women. The task force held listening sessions, Tribal consultations, webinars, meetings with law enforcement, and victims' services programs, and formed domestic violence and sexual assault coalitions . . . . The task force put out guidance and protocols, developed relationships with entities like missing persons clearing-houses, began training for investigators and volunteers, and started a public awareness campaign . . . . This legislation is cut from similar cloth . . . .

168 Cong. Rec. H3876-77 (remarks of Rep. Bentz); *see id.* H3878 (“The HVFRA assists families and loved ones of homicide victims by . . . [p]roviding a full reinvestigation using the most up-to-date technologies and investigative standards”); *About DOJ Efforts to Address MMIP*, <http://www.justice.gov/tribal/mmip/about> (containing a description and sources regarding enhanced investigative measures, relating to missing or murdered indigenous persons, under EO 14053 and 13898).

Paragraph (5) of § 95.3(b) would direct the reviewer to notify any other known Federal investigative agency that has been involved in the case and to consider any information provided by such other agency. The Act aims to ensure that reinvestigation decisions and the conduct of reinvestigations are informed by all available evidence. *See* HVFRA 4(b), 6(a). Reaching out to other agencies that have investigated or participated in the investigation of a murder is instrumental to realizing this objective. For example, another Federal investigative agency may have additional information about the case because it initially responded to or investigated the crime before engaging the principal investigative agency, or because it assisted the principal investigative agency in carrying out its investigation. The requirements of § 95.3(b)(5) accordingly would help to ensure that reinvestigation decisions and the conduct of reinvestigations are informed by all available evidence.

Section 95.3(c) of the proposed rule would implement section 2(d) of the Act, which bars having the reviewer be a person who previously investigated the murder. The proposed rule

would add that this restriction does not limit the reviewer in getting information from or consulting with people who were previously involved. Consulting such people may be especially valuable in understanding the case, and the reasons why things were done or not done in the previous investigation, and doing so does not conflict with the Act's objective of having "fresh eyes" cast on the case. H. Rep. No. 117-280, at 6; 168 Cong. Rec. H3876, 3879 (remarks of Rep. Jackson Lee).

Section 95.3(d) of the proposed rule would track section 2(e) of the Act, which requires the agency to promptly notify the applicant regarding receipt of the application and the applicant's rights under the Act.

Section 95.3(e) of the proposed rule would implement section 2(c) of the Act, which states that case file review is unnecessary where the case "does not satisfy the criteria for a cold case murder," and directs the agency to certify in such a case "that final review is not necessary because all probative investigative leads have been exhausted or that a likely perpetrator will not be identified." The certification described in section 2(c) does not reflect the circumstances in which the criteria for a cold case murder under the Act are not satisfied. Rather, the criteria for a "cold case murder" are not satisfied if the murder was committed within three years prior to the application, the murder was not previously investigated by a Federal law enforcement entity, all probative investigative leads have not been exhausted, or a likely perpetrator has been identified. HVFRA 12(6). To resolve this inconsistency, the proposed rule would provide that the agency is to certify in such a case that the cold case murder criteria are not satisfied and to inform the applicant of the reason for the denial.

#### *D. Section 95.4—Review procedures*

Section 95.4(a) of the proposed rule would implement section 3 of the Act, which requires each agency to develop a written application to be used in requesting case file reviews. The proposed rule would add that this requirement can be satisfied by an agency's adopting a standard form developed by the Government or another organizational unit of the Government.

Section 95.4(b) would state that an application for case file review may be denied if it is submitted to the wrong agency, i.e., an agency that did not previously investigate the murder or was not the principal investigative agency in the investigation. However, in such a case, the proposed rule would require the agency that receives the application to advise the applicant of the problem, and, if that agency is aware of another Federal investigative agency that was the principal investigative agency, to transfer the application to the appropriate agency if the applicant so wishes. If no Federal agency was the principal investigative agency in the initial investigation, then the case is outside the scope of the Act, but the proposed rule would direct the agency to which the application was submitted to point the applicant toward any known State or local agency that investigated the case.

Section 95.4(c)(1) would address situations in which more than one agency participated in the investigation of a murder. It would require coordination among the agencies so that there is only one case file review or full reinvestigation going on at any one time, following sections 2(f), 4(d), and 10 of the Act. The proposed rule generally assigns responsibility for case file reviews and reinvestigation to the principal investigative agency in the initial investigation. In case of disagreement among the agencies involved about who had primary responsibility for the prior investigation, § 95.4(c)(1) would direct them to jointly consider the application and collaborate in carrying out any case file review or reinvestigation, or responsibility for those functions could be assumed by or assigned to one of the agencies.

Section 95.4(c)(2) would address situations in which a family member of the victim submits an application for case file review, and then another family member submits an application with respect to the same victim during the pendency of the first application or a resulting case file review or reinvestigation. The latter application would conflict with the specification in section 2(a) of the Act that “one designated person” may apply for a case file review, which ensures that the responsible agency can deal in an orderly and efficient way with a single family contact. Section 95.4(c)(2) would provide that the agency need not take any action

based on the later application, but in such a case the agency shall advise the later applicant that there was an earlier application, and the agency may consider any information provided by the later applicant.

Section 95.4(c)(3) would state that only one case file review shall be undertaken at any one time with respect to the same cold case murder victim, tracking section 2(f) of the Act. The proposed rule would add that, for cases in which multiple applications are received with respect to different victims of a murder, any resulting case file reviews may be consolidated. While the Act does not require consolidation in the latter circumstance, conducting a single unified case file review may further the Act's objective of ensuring that all available evidence is fully considered.

Section 95.4(d) would implement section 2(g) and (h) of the Act, setting up a general six-month time limit for completing case file reviews, but allowing one extension of up to six months in certain circumstances.

#### *E. Section 95.5—Full reinvestigation*

Section 95.5(a) of the proposed rule would require a full reinvestigation if a case file review concludes that it would result in probative leads, following section 4(a) of the Act. Section 95.5(a) would refer to the proposed rule's definition of "probative leads" in § 95.2(h), which requires reinvestigation if there is information that identifies the perpetrator or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency's judgment and consistent with its policies and practices for use of investigative methods. In referring to the conclusion of a case file review, the Act contemplates, in accordance with its objective of solving cold case murders, that the agency will consider all the information it has at the time of the review in deciding whether to reinvestigate, including any new information provided by the applicant, not only information that appears directly in the case file. *See* HVFRA § 6 (implying that newly discovered evidence would be taken into account in case file review and reinvestigation decisions); H. Rep. No. 117-280, at 6 ("[N]on-law

enforcement personnel finding new evidence in homicide cases serve as examples where a fresh perspective can help break a case open.”); 168 Cong. Rec. H3877 (daily ed. Mar. 28, 2022) (remarks of Rep. Swalwell) (explaining that the HVFRA “requires a complete reexamination of the file and accompanying evidence”).

Section 95.5(b) of the proposed rule would specify what an investigative agency needs to do in conducting a full reinvestigation under the HVFRA. Section 95.5(b) first would define a full reinvestigation as one in which all new probative leads are exhausted. This definition is based on section 12(6)(C) of the Act, which defines a cold case murder in part as a murder “for which all probative investigative leads have been exhausted”; section 2(a) of the Act, which directs the agency to review the case file to determine if a full reinvestigation would result in “the identification of probative investigative leads or a likely perpetrator”; and section 4(a) of the Act, which directs the agency to conduct a full reinvestigation if the case file review concludes that it would result in “probative investigative leads.” These provisions manifest a purpose to address cases that have gone cold, in the sense that previously investigated leads that might have resulted in the identification of the perpetrator have not panned out; provide means for developing new potentially perpetrator-identifying leads through case file review; and follow up on those new leads to determine whether their promise for identifying the perpetrator can be realized.

Section 95.5(b) next would provide additional specifications regarding the conduct of full reinvestigations. Paragraph (b)(1) would require an investigative agency to analyze all evidence regarding the murder for the purpose of developing probative leads, following section 4(b) of the Act. The evidence available to the agency at the time of an HVFRA reinvestigation includes the content of the case file from the initial investigation and associated evidence retained from the initial investigation; any additional information that has been provided by the relative of the victim who applied for the case file review or that has come to the agency from other sources; and any additional leads or information that the agency may discover or develop in the course of

the reinvestigation. The direction of § 95.5(b)(1) is to apply the whole body of evidence in furtherance of identifying the perpetrator.

Paragraph (b)(2) would provide that a full reinvestigation under the HVFRA does not require pursuit of leads that are insufficiently probative with respect to the potential identification of the perpetrator to warrant further investigation in the agency's judgment, or that would require the use of investigative methods inconsistent with the agency's policies or practices. This is a reiteration, for clarity and explicitness, of limitations appearing in the definition of "probative leads" in § 95.2(h).

The reinvestigation criteria of § 95.5(a) and (b) of the proposed rule do not require investigative agencies to modify or waive their normal standards for initiating and conducting investigations, if consistent with the Act's requirements. For example, consider the Attorney General's Guidelines for Domestic FBI Operations ("FBI Guidelines" or "Guidelines"), <http://www.justice.gov/archive/opa/docs/guidelines.pdf>. These Guidelines apply only to the FBI's investigative activities, but other investigative agencies may have similar policies or guidelines. As relevant to the HVFRA, the FBI Guidelines authorize three levels of investigative activity: assessments, preliminary investigations, and full investigations. *Id.* Part II, pp. 16–22.

An assessment may be opened to obtain information about a Federal crime. Assessments may be used to check out or resolve allegations or other information concerning Federal crimes through the relatively non-intrusive methods authorized in assessments, such as obtaining publicly available information, checking government records, using online services and resources, and interviewing witnesses. *Id.* at 17–20. An HVFRA reinvestigation could be opened as an assessment under the Guidelines in any case because the reinvestigation has the purpose of obtaining information about the murder in question, specifically, the identity of the perpetrator.

The Guidelines authorize the FBI to initiate a preliminary investigation if there is information or an allegation indicating that (i) a Federal crime may have occurred and (ii)

investigation may obtain information relating to the crime or the involvement or role of an individual in the crime. Preliminary investigations may involve all lawful investigative methods, with the exception of electronic surveillance and intrusive searches. *Id.* Part II.B, pp. 20–22.

In the context of the HVFRA, the FBI’s initial investigation of the murder for which reinvestigation is sought implies that the FBI already has information indicating the possible commission of a Federal crime—i.e., the murder in question—which satisfies the first precondition for opening a preliminary investigation. The second precondition under the Guidelines for opening a preliminary investigation is also satisfied, because the HVFRA’s basis for requiring a reinvestigation is probative leads resulting from the case file review. This ensures that there is now a new lead such that further investigation may obtain information relating to the murder or the involvement or role of an individual (i.e., the heretofore unknown perpetrator) in the murder.

Accordingly, reinvestigations under the HVFRA may be opened as preliminary investigations under the Guidelines. The methods excluded in preliminary investigations—electronic surveillance and intrusive searches—would then not be available. But if these methods were needed to pursue the probative leads underlying the reinvestigation and legally permitted, they could be secured by opening or reopening the HVFRA reinvestigation as a full investigation under the Guidelines.

The Guidelines allow the FBI to initiate a full investigation if there is an articulable factual basis for the investigation that reasonably indicates that (i) a Federal crime may have occurred and (ii) the investigation may obtain information relating to the crime or the involvement or role of an individual in the crime. Full investigations may involve all lawful investigative methods. *Id.*

The preconditions for opening a full investigation under the Guidelines are likely to be satisfied in any case involving reinvestigation under the HVFRA. This is so because it is unlikely that the FBI would have previously investigated a murder, and now judges, following a

case file review, that new leads are sufficiently likely to enable the identification of the perpetrator to warrant further investigation, in the absence of articulable facts that reasonably indicate that (i) the murder may have occurred and (ii) the reinvestigation may obtain information relating to the murder or the involvement or role of an individual (i.e., the heretofore unknown perpetrator) in the murder.

The preconditions for opening a full investigation under the Guidelines will always be satisfied in HVFRA reinvestigation cases in which opening a full investigation under the Guidelines is needed to pursue the investigative methods excluded in preliminary investigations—electronic surveillance and intrusive searches—and use of those methods is legally permitted. This is so because the legal predication requirements for authorizing those methods, including probable cause, exceed the “articulable factual basis” required for opening a full investigation under the Guidelines. On the other hand, if the legal predication required for use of electronic surveillance or intrusive searches is not satisfied, use of those methods would not be required in an HVFRA reinvestigation, because only investigative methods consistent with agency policy need be used, *see* § 95.5(b)(2), and only lawful methods are consistent with the Guidelines.

It follows that when the conditions for required reinvestigation under the HVFRA and the rule are satisfied, the conditions for initiating an investigation under the Guidelines for the FBI’s investigative activities will also be satisfied. There is accordingly no conflict or inconsistency between investigation or reinvestigation in conformity with the Guidelines’ standards and investigation or reinvestigation in conformity with the HVFRA’s requirements. The same point would apply to other investigative agencies with investigative policies resembling the FBI’s in relevant respects.

Section 95.5(c) of the proposed rule would implement section 4(c) of the Act, which provides that a reinvestigation shall not be conducted by a person who previously investigated the murder. The proposed rule would add that this does not limit consulting with or obtaining

information from a previously involved person, or using such a person in a subordinate role in the reinvestigation. Engaging people with previous knowledge of the case in a reinvestigation has similar value to engaging such persons in case file reviews, as discussed above, and does not conflict with the objectives of the Act.

Section 95.5(c) does not bar a person who carried out a case file review under the Act from conducting or being involved in an ensuing reinvestigation. It only precludes reinvestigation by a person who previously investigated the murder. The heading of section 4(c) of the Act, “Reviewer,” does not signify the contrary. It replicates the heading of the corresponding provision regarding case file reviews, section 2(d), and reflects in both contexts a policy of ensuring that “fresh eyes” will be cast on the case, H. Rep. No. 117-280, at 6; 168 Cong. Rec. H3876, 3879 (remarks of Rep. Jackson Lee), by prohibiting people who previously investigated the case from conducting case file review and any resulting reinvestigation. This policy does not imply that the role of the case file reviewer in subsequent reinvestigation should be restricted. The legislative history of the HVFRA further confirms that the case file reviewer may conduct a resulting reinvestigation under the HVFRA. H. Rep. No.117-280, at 10 (“The person(s) conducting the full reinvestigation must not have previously investigated the cold case murder at issue, *except for the case file review described in section 2.*”) (emphasis added).

Section 95.5(d) would provide that there can be only one full reinvestigation at any time with respect to the same cold case murder victim, tracking section 4(d) of the Act. As with case file reviews, the proposed rule would add that if reinvestigation is found to be warranted with respect to multiple victims, the resulting reinvestigations may be consolidated.

#### *F. Section 95.6—Multiple agencies*

Section 95.6, which would track section 10 of the Act, would require that case file reviews and reinvestigations be carried out in a cohesive way when more than one agency is involved, so that there is only one joint case file review or reinvestigation happening with respect to a cold case murder at any time.

### *G. Section 95.7—Consultation, updates, and explanation*

Section 95.7 would implement section 5 of the Act, regarding agency consultations, updates, and explanation of reinvestigation decisions.

Section 95.7(a) and (b) would require investigative agencies to consult with applicants and provide them with periodic updates. With respect to consultation, the proposed rule would explain that this requires discussing the application with the applicant on at least one occasion.

Section 95.7(c) would require investigative agencies to meet with the applicant and discuss the evidence to explain the decision whether or not to reinvestigate at the conclusion of a case file review. There are constraints on discussing the evidence in pending investigations with private persons, as the Act recognizes in section 9, which provides that information may be withheld if it would endanger the safety of any person, unreasonably impede an ongoing investigation, violate a court order, or violate legal obligations regarding privacy. Additional concerns about disclosing investigative information include potentially damaging the reputation of persons who come under suspicion, but may eventually be cleared, and exposing them to harassment and other adverse social consequences. Accordingly, § 95.7(c) would make clear that the discussion of the evidence with an applicant may be at an appropriate level of generality that does not involve disclosing the information described in section 9 of the Act and that is consistent with the general policies and practices affecting the sharing of information with murder victims' family members. *See, e.g.*, The Attorney General Guidelines for Victim and Witness Assistance, Arts. II.B, IV.I (2022 ed.).

Section 95.7(d) would provide that meetings required under § 95.7 may be carried out in person, or through remote video communication, the latter option often being more convenient for both the agency and victims' family members. It further states that consultations and updates may be carried out in person, or through other means of communication, such as over the phone or by email.

### *H. Section 95.8—Subsequent reviews*

Section 95.8 of the proposed rule would implement section 6 of the Act, which provides that case file reviews and reinvestigations generally do not have to be undertaken more frequently than at five-year intervals.

Paragraph (a) of § 95.8 would incorporate the basic rule that case file reviews and reinvestigations need not be undertaken more frequently than at five-year intervals, subject to a proviso for situations in which “there is newly discovered, materially significant evidence.”

Paragraph (b) of § 95.8 would explain the proviso for situations involving new, material evidence. The proposed rule would interpret this proviso in a manner consistent with the definition of “probative leads” in § 95.2(h). Specifically, case file reviews and reinvestigations may need to be undertaken at intervals of less than five years only if there is evidence discovered subsequent to the previous case file review or reinvestigation that identifies the perpetrator, or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency’s judgment and consistent with its policies and practices regarding the use of investigative methods.

Paragraph (c) of § 95.8 would resolve an inconsistency in the language of section 6 of the Act. Section 6(a) says that if a case is not reinvestigated, “no additional case file review shall be required to be undertaken . . . for a period of five years.” Section 6(b) says that if a full reinvestigation is completed without identifying the perpetrator, “no additional case file review or full reinvestigation shall be undertaken . . . for a period of five years.” In other words, where subsection (a) says that an agency is not required to engage in further review of the case for five years, subsection (b) seems to say that the agency cannot engage in further review of the case for five years.

Considering the Act’s purpose of promoting the solution of cold case murders, the prohibitory language of subsection (b) appears to reflect a drafting error that resulted from adding the “required to be” language appearing in subsection (a) but neglecting to add the same language in subsection (b). *Cf.* H.R. 3359, 117th Cong., 1st Sess., § 7 (proposed HVFRA as

originally introduced). No reason appears why Congress, in enacting the HVFRA, would have sought to prohibit agencies from exercising their broad discretion to reopen cold case murder investigations if a case was reinvestigated unsuccessfully under the HVFRA. “Congress could not plausibly have intended” this “illogical” outcome, *Stovic v. Railroad Retirement Board*, 826 F.3d 500, 505 (D.C. Cir. 2016), which would deprive agencies of their pre-existing discretion to reopen the investigation of cold case murders at any time, as warranted in their judgment, and would impose a restriction on agency discretion to reopen murder investigations that does not apply to reopening investigations of any other type of crime. The rule would resolve the inconsistency by providing in § 95.8 that “[a]n agency may, in its discretion, review case files, continue investigation, or reinvestigate notwithstanding the absence of an application by a designated person or the time when previous review, investigation, or reinvestigation occurred.”

#### *I. Section 95.9—Procedures to promote compliance*

Section 95.9(a) would implement section 8 of the Act by requiring each agency to promulgate regulations to enforce the rights of designated persons under the Act and ensure compliance, including designation of an administrative authority to receive and investigate complaints, training of appropriate personnel regarding the Act, disciplinary sanctions for “willful or wanton” noncompliance, and a procedure for resolving complaints.

Section 95.9(a)(1) would provide that the requirement to issue such regulations applies to agencies that may be the principal investigative agencies in murder investigations, because the proposed rule assigns responsibility for carrying out the Act to those agencies. The proposed rule would further specify that agencies need not separately promulgate regulations to the extent they adopt, or are subject to, regulations issued by another organizational unit of the Government regarding these matters. For example, a Department that includes a number of agencies that investigate murders may have Department-wide rules and processes regarding training and disciplinary sanctions for violations of the Act.

Section 95.9(a)(2) would specify the content of the regulations that agencies must promulgate.

Section 95.9(a)(3) would provide that the “agency” for these purposes may be a broader organizational unit of the Government in which the principal investigative agency is situated. Many provisions of the Act direct the responsible “agency” (or head of the agency) to take certain actions. *See* HVFRA 2(a) (review of case file), 2(c) (certification in lieu of review), 2(e) (confirmation of receipt of application and notice of rights), 2(g) through (h) (time limits for agency to conclude review), 4(a) (conduct of full reinvestigation), 5 (agency to consult, update, and meet with the applicant), 8 (complaint and disciplinary functions to ensure compliance with the Act), 10 (multiple agencies to coordinate), 13 (submission of reports to congressional committees). Depending on the nature of the required action and the operational conditions and practices of the affected governmental entities, it may make sense for the required actions to be carried out by the particular governmental component that investigated a case, or alternatively, at the departmental level or another broader level. Either approach is legitimate and consistent with the Act’s definition of “agency” as “a Federal law enforcement entity with jurisdiction to engage in the detection, investigation, or prosecution of a cold case murder,” HVFRA 12(5), since both the individual component and the broader organizational unit of Government in which it is situated are governmental entities with law enforcement functions. Section 95.9(a)(3) confirms this point with respect to the training, complaint, and disciplinary functions described in HVFRA 8. For example, with respect to the requirement of section 8(b)(1) of the Act that the regulations designate an administrative authority “within the agency to receive and investigate complaints,” a Department may decide to assign this function to its Inspector General for all of its components, taking “the agency” in this context to refer to the Department as a whole. But it is also consistent with the Act if a Department decides to assign these functions to its individual investigative components, as § 95.9(b) provides for the Department of Justice.

Section 95.9(b) would implement the requirements of section 8 of the Act with respect to the agencies of the Department of Justice specifically, including the FBI, which is broadly responsible for investigating murders within the scope of the Act. For the Justice Department agencies, the training, complaint, and disciplinary matters required by section 8 of the Act are most appropriately carried out by the individual investigative agencies within the Department.

Section 95.9(b)(1) would require each such agency to provide training for officers and employees involved in carrying out the Act, following the requirement of section 8(b)(2) of the Act.

Section 95.9(b)(2) would require each agency to designate an official to receive and investigate complaints of HVFRA violations, following the requirement of section 8(b)(1) of the Act. In some instances the designated official may have a conflict of interest in investigating a complaint, such as when the complaint relates to actions the designated official was involved in. In such cases, the proposed rule would direct the official to notify the entity within the agency responsible for addressing or resolving such conflicts, and investigation of the complaint may be assigned to a different official.

Section 95.9(b)(3) and (4) would carry out the requirement of section 8(b)(4) of the Act to provide a procedure for the resolution of complaints under the Act.

Section 95.9(b)(3) would provide initially that a complaint may be submitted in writing by the person who requested the case file review under section 95.3(a). Since the persons who have requested a case file review under the Act are the individuals who have rights under the Act, they are the appropriate persons to complain if the Act's requirements have not been complied with. This would comport with the Act's direction in section 8(a) that the agency must "promulgate regulations to enforce the right of a designated person to request a review under this Act," and the Act's direction in section 8(b)(4) that the agency must provide a procedure for the resolution of complaints filed by "the designated person," i.e., the person who requested a case file review.

Section 95.9(b)(3) further would provide timing rules for the submission of complaints. These timing rules are designed both to provide applicants adequate time to bring alleged violations of the Act to the agency's attention, and to promote the prompt investigation of potential violations and fairness to agency personnel who may be the subject of complaints. The general time limit to submit a complaint is one year after the complainant becomes aware of a violation. However, a complaint would be timely within one year of the complainant's being informed of the completion of a case file review or reinvestigation, regardless of when the complainant became aware of the violation. The time would be extended to five years after the application for case file review was submitted if the agency did not inform the applicant about completion of a case file review or reinvestigation, either because a review or reinvestigation is ongoing or because the agency failed to inform the applicant of the completion of a case file review or reinvestigation as required by § 95.7(b) and (c). Section 95.9(b)(3) also would state that a complaint submitted outside the specified time frames must include an explanation for why it was not timely submitted. If satisfied by the explanation, the agency could entertain an untimely complaint, but only as a matter of discretion.

The remainder of § 95.9(b)(3) would specify information to be included in a complaint, to the extent the complainant is able, which is needed to enable the agency official to investigate the complaint. This includes providing identifying information for the complainant, the case, and any agency officer or employee whose conduct is the subject of the complaint, together with information about the nature of the alleged violation, when and how it occurred, and any prior dealings with agency personnel about it.

Section 95.9(b)(4) would direct the agency official to investigate a complaint that satisfies the proposed rule's conditions, document and close the investigation in conformity with agency procedures, and inform the complainant about the disposition of the complaint. It further directs the agency official to determine whether further action is warranted. For example, if it is determined that measures required by the Act were not taken, such as the consultation, updating,

and explanation requirements of section 5 of the Act, supplying the omitted measures may now be warranted, and retraining or referral for disciplinary action may be warranted for officers and employees who violated the Act, depending on their culpability and the nature of the violation.

Section 95.9(b)(4) would provide, however, that the complaint procedure is not available to entertain complaints about the initial investigation of the murder, or to revisit the agency's decision whether reinvestigation is warranted under the Act. This reflects the complaint procedure's function of promoting compliance with the Act and addressing violations of the Act. Its purposes do not include reviewing the conduct of the initial investigation or providing a second opinion whether the results of a case file review under the Act warrant reinvestigation.

Section 8 of the HVFRA, which is titled "Procedures to Promote Compliance," requires agencies to promulgate regulations that provide a procedure for resolving complaints "concerning the agency's handling of a cold case murder investigation or the case file evaluation," in order "to enforce the right of a designated person to request a review under this Act and to ensure compliance by the agency with the obligations described in this Act." This statutory language is naturally understood to require a complaint procedure to address violations of the HVFRA—not to second-guess the agency's handling of the initial investigation, which is not subject to the HVFRA, or to secure a re-examination or redetermination of whether the results of an HVFRA case file review warrant reinvestigation. On the latter point, nothing in the HVFRA suggests that the personnel responsible for the complaint and disciplinary process must be empowered to redetermine the matter and potentially override the judgment of the responsible agents who carried out the case file review and decided whether to conduct a reinvestigation. Rather, the HVFRA entitles a qualifying applicant to one case file review, and provides that the agency is not required to do another for five years, absent newly discovered and materially significant evidence. HVFRA 6. Section 95.9(b)(4) would make these points clear.

Section 95.9(b)(4) would also specify that the agency's complaint procedure is not available to entertain complaints about personnel of other agencies, whose conduct is properly the responsibility of their employing agencies.

Section 95.9(b)(5) would make the agency head or a designee the final arbiter of the complaint, and preclude judicial review, following section 8(b)(5) of the Act.

Section 95.9(b)(6) would provide that officers or employees of the agency who have failed to comply with the Act may be required to undergo retraining or additional training, and it would carry out the requirement of section 8(b)(3) of the Act for disciplinary sanctions, including potentially suspension or termination of employment, for willful or wanton violations.

Section 95.9(b)(7) would provide that the complaint process provisions do not authorize the agency to exercise authority over, take disciplinary action against, or involve officers or employees of other agencies. This reflects the normal division of authority and responsibility among Federal agencies. For example, an Assistant U.S. Attorney ("AUSA") may have some involvement in an HVFRA case file review or reinvestigation, such as being consulted on a legal question, being asked to secure a warrant or subpoena, or being presented with the results of a reinvestigation for a decision whether to prosecute. As in other investigative contexts, that would not bring the AUSA within the scope of the investigative agency's complaint processes or subject the AUSA to any authority of the investigative agency.

#### *J. Section 95.10—Data collection*

Section 95.10 would implement section 7 of the Act, which requires the National Institute of Justice to publish annual statistics regarding cold case murders. The proposed rule would provide that the Attorney General may delegate this function to the Bureau of Justice Statistics or another Justice Department component, which may be more appropriate agencies to carry out this function. Delegating statutory functions to other components is within the Attorney General's authority under 28 U.S.C. 509, 510. The proposed rule would also specify the relevant

time frames and classes of cold case murders to be covered in each annual publication of statistics.

*K. Section 95.11—Annual report*

Section 95.11 would implement section 13 of the Act, which requires each agency to submit annual reports to the House and Senate Judiciary Committees describing actions taken and results achieved under the Act. The proposed rule would specify that the reporting requirement applies to agencies that may be the principal investigative agencies in the investigation of murders, because the rule assigns responsibility for carrying out the Act to those agencies, and other agencies would have nothing to report. The proposed rule further would provide that an agency need not submit a separate report if the required information with respect to the agency is included in a report submitted by another organizational unit of the Government. For example, a Department may wish to submit consolidated annual reports providing the required information for all of its investigative agencies. The latter approach may be more consistent with the Department's general procedures in dealing with Congress and more useful to the Committees than separate reports from individual agencies.

*L. Section 95.12—Withholding information*

Section 95.12, tracking section 9 of the Act, would make it clear that the Act does not require an agency to disclose information that would endanger the safety of any person, unreasonably impede an ongoing investigation, violate a court order, or violate legal obligations regarding privacy.

## **V. Regulatory Requirements**

*A. Regulatory Flexibility Act*

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the purposes of

that Act because the regulation only concerns the review and reinvestigation of cold case murders by Federal investigative agencies.

*B. Executive Orders 12866, 13563, and 14094—Regulatory Review*

The Office of Management and Budget has determined that this rulemaking is a “significant regulatory action” under section 3(f) of Executive Order 12866, 58 FR 51735, 51738 (Oct. 4, 1993), but it is not a section 3(f)(1) significant action. Accordingly, this proposed rule has been submitted to the Office of Management and Budget (“OMB”) for review. This proposed rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, Executive Order 13563, 76 FR 3821 (Jan. 21, 2011), and Executive Order 14094, 88 FR 21879 (Apr. 11, 2023).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). 58 FR 51735-36; 76 FR 3821. Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. 76 FR 3822.

The costs and benefits of this rulemaking, which implements the HVFRA’s requirements, are attributable to the HVFRA itself. The costs include the work required in processing applications, carrying out case file reviews, and reinvestigating cold case murders as warranted, in conformity with the HVFRA. The benefits include solving cold case murders where the HVFRA process is successful and providing closure for the victims’ families. No alternative regulatory approach would significantly reduce these costs while achieving the benefits constituting the legislative objective with similar effectiveness.

*C. Executive Order 13132—Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and

responsibilities among the various levels of government, as outlined by Executive Order 13132, 64 FR 43255 (Aug. 10, 1999). The regulation only concerns the review and reinvestigation of cold case murders by Federal investigative agencies.

*D. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments*

The Department of Justice and the Department of the Interior, in accordance with section 5(b) of Executive Order 13175, 65 FR 67249 (Nov. 9, 2000), will consult with Tribal officials regarding this proposed regulation.

*E. Executive Order 12988—Civil Justice Reform*

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729, 4731 (Feb. 7, 1996), to specify provisions in clear language. Pursuant to section 3(b)(1)(I) of the Executive Order, nothing in this proposed rule is intended to create any legal or procedural rights enforceable against the United States.

*F. Unfunded Mandates Reform Act of 1995*

This rule when finalized will not result in the expenditure by State, local and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. The rule only concerns the review and reinvestigation of cold case murders by Federal investigative agencies.

*G. Congressional Review Act*

This rule is not a “major rule” as defined by the Congressional Review Act, 5 U.S.C. 804(2).

**List of Subjects in 28 CFR Part 95**

Crime, Law enforcement.

**Authority and Issuance**

Accordingly, for the reasons stated in the preamble, the Department of Justice proposes to add 28 CFR part 95 to read as follows:

## **PART 95—HOMICIDE VICTIMS’ FAMILIES’ RIGHTS**

Sec.

95.1 Purpose.

95.2 Definitions.

95.3 Case file review.

95.4 Review procedures.

95.5 Full reinvestigation.

95.6 Multiple agencies.

95.7 Consultation, updates, and explanation.

95.8 Subsequent reviews.

95.9 Procedures to promote compliance.

95.10 Data collection.

95.11 Annual report.

95.12 Withholding information.

**Authority:** Pub. L. 117-164, 136 Stat. 1358.

### **§ 95.1 Purpose.**

The purpose of this part is to implement the Homicide Victims’ Families’ Rights Act of 2021 (the “Act”). The Act provides for a system to review the case files of cold case murders at the instance of certain persons and potentially carry out further investigation.

### **§ 95.2 Definitions.**

In this part:

(a) The term “designated person” means a parent, step-parent, parent-in-law, grandparent, grandparent-in-law, sibling, spouse, child, or step-child of a murder victim.

(b) The term “victim” means a natural person who died as a result of a cold case murder.

(c)(1) The term “murder” means an offense under 18 U.S.C. 1111, or another Federal offense that incorporates by reference the elements of 18 U.S.C. 1111. The offenses that incorporate by reference the elements of 18 U.S.C. 1111 are—

(i) A murder committed in Indian country, investigated as a crime potentially prosecutable under 18 U.S.C. 1152 or 1153;

(ii) A murder in which the victim was a Federal officer or employee, or another person whose status or activities would make the person’s murder a Federal crime, investigated as a crime potentially prosecutable under 18 U.S.C. 115, 351, 1114, 1116, 1121, 1503, 1512, 1513, 1751, or 1841; 7 U.S.C. 2146; 15 U.S.C. 1825; or 21 U.S.C. 461, 675, or 1041;

(iii) A murder in which the victim was a United States national killed outside of the United States, investigated as a crime potentially prosecutable under 18 U.S.C. 1119 or 2332; and

(iv) A murder in which the status or activities of the perpetrator, or the means or circumstances of the murder’s commission, would make the murder a Federal crime, investigated as a crime potentially prosecutable under 18 U.S.C. 36, 924(j), 930, 1118, 1120, 1652, 1958, 1959, 2245, 3261, or 3273; or 49 U.S.C. 46506.

(2) The term “murder” does not include—

(i) A murder in which the victim died before January 1, 1970;

(ii) A murder that is not an offense under the laws of the United States, even if it is an offense under the laws of a State, the District of Columbia, or a territory or possession of the United States; or

(iii) Any offense, conduct, or occurrence that did not involve the commission of a murder as defined in paragraph (c)(1) of this section.

(d) The term “agency” means a Federal law enforcement entity with jurisdiction to engage in the detection, investigation, or prosecution of a cold case murder. The term “agency”

does not include a State or local law enforcement entity or a law enforcement entity of the District of Columbia or a territory or possession of the United States.

(e) The term “principal investigative agency” means the Federal investigative agency that had the primary responsibility for the initial investigation of a murder. In a case in which a murder was investigated by State or other non-Federal authorities and the role of Federal agencies was the provision of investigative assistance, and in a case in which a murder was investigated by a Federal agency but thereafter State or other non-Federal authorities assumed the primary responsibility for the investigation, no Federal agency was the principal investigative agency and the case is not within the scope of this part. A prosecutorial agency of the Department of Justice, though involved in the investigation of a murder, is not the principal investigative agency in any case.

(f) The term “initial investigation” means the investigation of a murder before it became a cold case murder.

(g) The term “cold case murder” means a murder—

(1) In which the victim died more than three years prior to the date of an application by a designated person under § 95.3;

(2) Previously investigated by a Federal law enforcement entity;

(3) For which all probative leads have been exhausted; and

(4) For which no likely perpetrator has been identified.

(h) The term “probative leads” means information that identifies the perpetrator or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency’s judgment and consistent with the agency’s policies and practices regarding the use of investigative methods. Variant terminology used in some provisions of the Act, “probative investigative leads,” has the same meaning.

### **§ 95.3 Case file review.**

(a) *In general.* Upon written application by one designated person, the principal investigative agency shall review the case file regarding a cold case murder to determine if a full reinvestigation would result in probative leads.

(b) *Review.* A review under paragraph (a) of this section shall include the following elements:

(1) An analysis of what investigative steps or follow-up steps may have been missed in the initial investigation. This element requires the reviewer to consider whether, in the reviewer's judgment, there were steps or follow-up steps that should have been taken in the original investigation but were not taken.

(2) An assessment of whether witnesses should be interviewed or reinterviewed. This element requires the reviewer to consider whether, in the reviewer's judgment, there were witnesses in the original investigation who should have been interviewed but were not interviewed, or who should have been asked additional questions or interviewed in a different manner than in the original investigation.

(3) An examination of physical evidence to see if all appropriate forensic testing and analysis was performed in the first instance or if additional testing might produce information relevant to the investigation. This element has two aspects. It requires the reviewer to consider whether, in the reviewer's judgment, there was forensic testing available at the time, such as checking for latent fingerprints, which should have been carried out in the initial investigation but was not carried out. It also requires the reviewer to consider whether there have been advances in forensic technology or methods, such as more sensitive DNA testing, which were unavailable at the time of the initial investigation, but which would now be utilized in a like investigation under current policies and practices regarding the use of investigative methods.

(4) An update of the case file using the most current investigative standards as of the date of the review to the extent it would help develop probative leads. This element requires the reviewer to consider whether additional or potentially more effective investigative measures

would have been taken in the initial investigation had current investigative standards been in effect. For example, two Executive Orders, EO 14053 and EO 13898, have been issued, in 2021 and 2019 respectively, to enhance and prioritize the investigation of cases involving missing or murdered indigenous persons. This element requires the reviewer to consider in such cases whether application of the current investigative standards would help develop probative leads.

(5) If the reviewer is aware of another agency that investigated or participated in the investigation of the murder, notification of the other agency that the case is under review and consideration of any information provided by the other agency.

(c) *Reviewer.* A review under paragraph (a) of this section shall not be conducted by a person who previously investigated the murder at issue. This does not limit the reviewer in seeking information from or consulting with a person who conducted or was involved in the initial investigation.

(d) *Acknowledgment.* The agency shall provide in writing to the applicant, as soon as reasonably possible, confirmation of the agency's receipt of the application and notice of the applicant's rights under the Act.

(e) *Certification in lieu of review.* The application for a case file review may be denied if the case does not satisfy the criteria for a cold case murder as defined in § 95.2(g). If a case file review is denied on this ground, the agency shall issue a written certification that the case does not satisfy the criteria for a cold case murder and shall inform the applicant of the reason for the denial.

#### **§ 95.4 Review procedures.**

(a) *Application form.* Each agency that may be the principal investigative agency in a cold case murder investigation shall develop a written application form to be used for designated persons to request a case file review. An agency may adopt for this purpose a standard form developed by the government, or by another organizational unit of the government, and need not separately develop an agency-specific form.

(b) *Responsible agency.* An application for a case file review may be denied if it is submitted to an agency that did not previously investigate the murder or was not the principal investigative agency in the initial investigation of the murder. If a case file review is denied on this ground, the agency shall inform the applicant of the reason for the denial. If the agency is aware of another Federal agency that was the principal investigative agency in the initial investigation, the agency shall so advise the applicant and shall, if the applicant wishes, transfer the application to the principal investigative agency. If no Federal agency was the principal investigative agency in the initial investigation, but the agency knows the identity of a non-Federal entity that investigated the murder, the agency shall so advise the applicant.

(c) *Multiple agencies or applications.* (1) If more than one agency participated in the investigation of a murder, the agencies shall coordinate any case file review or full reinvestigation so that there is only one joint case file review or full reinvestigation at any one time. An application for review shall not be denied based on disagreement among agencies as to which agency was the principal investigative agency in the initial investigation. In such a case, the relevant agencies shall jointly consider the application and collaborate in carrying out any resulting case file review or reinvestigation, or responsibility for those functions may be assumed by or assigned to one of the agencies involved.

(2) An agency need not take any action based on an application by a designated person during the pendency of an application by another designated person with respect to the same victim, or during the pendency of a resulting case file review or reinvestigation, but the agency shall advise the applicant that there was an earlier application and may consider any information provided by the later applicant.

(3) Only one case file review shall be undertaken at any one time with respect to the same cold case murder victim. If an agency receives multiple applications with respect to different victims, it may consolidate any resulting case file reviews.

(d) *Time limit.* An agency shall complete a case file review and decide whether a full reinvestigation is warranted not later than six months after the receipt by the agency of the application resulting in the review. The agency may extend this time limit once for a period not exceeding six months if the agency finds that the number of case files to be reviewed makes it impracticable to comply with the time limit without unreasonably taking resources from other law enforcement activities. If the time limit is extended, the agency shall notify and explain its reasoning to the applicant.

### **§ 95.5 Full reinvestigation.**

(a) *In general.* An agency shall conduct a full reinvestigation of a cold case murder if review of the case file concludes that a full reinvestigation would result in probative leads. As provided in the definition of “probative leads” in § 95.2(h), this means that a full reinvestigation is required if the case file review produces information that identifies the perpetrator or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency’s judgment and consistent with the agency’s policies and practices regarding the use of investigative methods.

(b) *Full reinvestigation.* A full reinvestigation for purposes of the Act means an investigation in which all new probative leads are exhausted. A full reinvestigation—

(1) Shall include analyzing all evidence regarding the murder for the purpose of developing probative leads; but

(2) Need not involve pursuing leads that do not, in the agency’s judgment, provide a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, or whose pursuit is not consistent with the agency’s policies and practices regarding the use of investigative methods.

(c) *Person conducting reinvestigation.* A reinvestigation shall not be conducted by a person who previously investigated the murder. This prohibition does not limit consulting with

or obtaining information from a person involved in the previous investigation, or using such a person in a subordinate role in the reinvestigation.

(d) *Unified reinvestigation.* Only one full reinvestigation shall be undertaken at any one time with respect to the same cold case murder victim. If reinvestigation is found to be warranted with respect to multiple victims, the resulting reinvestigations may be consolidated.

#### **§ 95.6 Multiple agencies.**

If more than one agency conducted the initial investigation of a cold case murder, each agency shall coordinate with the other agency or agencies any case file review or full reinvestigation so that there is only one case file review or full reinvestigation occurring at a time, as provided in §§ 95.4(c) and 95.5(d).

#### **§ 95.7 Consultation, updates, and explanation.**

(a) *Consultation.* The agency shall consult with the designated person who filed an application for case file review. This means discussing the application with the applicant on at least one occasion.

(b) *Updates.* The agency shall provide the applicant with periodic updates during any case file review or full reinvestigation. The required update shall include informing the applicant whether the review or reinvestigation is in progress or has been completed.

(c) *Explanation of decision.* At the conclusion of a case file review, the agency shall meet with the applicant and discuss the evidence to explain the decision whether or not to engage in a full reinvestigation. Discussion of the evidence and explanation of the decision do not require disclosure of information described in § 95.12 or other information that would not generally be shared with a victim's family members in the investigation of a murder.

(d) *Means of communication.* Meetings required under this section may be carried out in person or through remote video communication. Consultations and updates may be carried out in person or through any other means of communication.

#### **§ 95.8 Subsequent reviews.**

(a) *In general.* If an agency concludes following a case file review that a full reinvestigation is not warranted, or if a full reinvestigation is undertaken and completed without identifying a likely perpetrator, no additional case file review or reinvestigation is required to be undertaken with respect to a cold case murder for a period of five years, unless there is newly discovered, materially significant evidence.

(b) *New material evidence.* For purposes of the Act, newly discovered, materially significant evidence means evidence discovered subsequent to the previous case file review or reinvestigation that identifies the perpetrator or that provides a sufficient likelihood of enabling the identification of the perpetrator to warrant further investigation, in the agency's judgment and consistent with the agency's policies and practices regarding the use of investigative methods.

(c) *Discretionary authority.* An agency may, in its discretion, review case files, continue investigation, or reinvestigate notwithstanding the absence of an application by a designated person or the time when previous review, investigation, or reinvestigation occurred.

#### **§ 95.9 Procedures to promote compliance.**

(a) *In general—(1) Regulations.* The Act provides that, not later than August 3, 2023, each agency shall promulgate regulations to enforce the right of a designated person to request a review under the Act and to ensure compliance by the agency with the obligations described in the Act. This requirement applies to any agency that may be the principal investigative agency in a murder investigation. An agency is not required to separately promulgate regulations to the extent it adopts, or is subject to, regulations issued by another organizational unit of the government regarding the matters described in this section.

(2) *Content of regulations.* The Act provides that the regulations promulgated under paragraph (a)(1) of this section shall—

(i) Designate an administrative authority within the agency to receive and investigate complaints relating to case file reviews and reinvestigations and provide a procedure for the resolution of such complaints;

(ii) Require a course of training for appropriate employees and officers within the agency regarding the procedures, responsibilities, and obligations under the Act;

(iii) Contain disciplinary sanctions, which may include suspension or termination from employment, for employees of the agency who have willfully or wantonly failed to comply with the Act; and

(iv) Provide that the head of the agency, or a designee, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the head of the agency or designee by a complainant.

(3) *Agency.* For purposes of paragraphs (a)(1) and (2) of this section, the “agency” may be a broader organizational unit of the government in which the principal investigative agency is situated.

(b) *Department of Justice.* The following shall apply to each agency of the Department of Justice that may be the principal investigative agency in a cold case murder investigation:

(1) The agency shall require a course of training regarding the procedures, responsibilities, and obligations required under the Act for agency officers and employees whose involvement in carrying out the Act warrants such training.

(2) The agency shall designate an official within the agency to receive and investigate complaints alleging that the agency engaged in a violation of the Act relating to case file review or reinvestigation of a cold case murder. If investigation of a complaint by the official could create a conflict of interest, the official shall notify the appropriate individual or office within the agency and investigation of the complaint may be assigned to a different official.

(3) A complaint under this subsection must be submitted in writing by a person who applied for case file review under § 95.3(a). The complaint must be submitted within one year of

the complainant's knowledge of a violation or receipt of information from the agency indicating completion of a case file review or reinvestigation, but if no such information has been received from the agency, then within five years of the submission of the application for case file review. A complaint submitted outside these time frames must include an explanation for why it was not timely submitted, which will be considered in deciding whether to accept the application. The complaint shall contain, to the extent known to, or reasonably available to, that person, the following information:

(i) The name and contact information of the complainant.

(ii) The investigative case number or name of the murder victim.

(iii) Any tracking number or other identifier of the complainant's application for case file review under § 95.3(a).

(iv) If the complaint pertains to a specific officer or employee of the agency, that person's name and contact information, or other identifying information if the complainant is not able to provide name and contact information.

(v) Information about the alleged violation of the Act sufficient to enable the agency official to conduct an investigation including: the nature of the violation; when and how it occurred; whether, when, and how the complainant notified an agency officer or employee of the alleged violation; and any actions taken by an agency officer or employee in response to such notification.

(4) The agency official shall investigate a complaint that satisfies the conditions set forth in paragraph (b)(3) of this section, determine whether further action is warranted, document and close the investigation of the complaint in conformity with agency procedures, and inform the complainant about the disposition of the complaint. However, the complaint procedure under this subsection is not available to present complaints about the conduct of the initial investigation, to present complaints about the conduct of an officer or employee of another

agency, or to secure a reexamination or redetermination of the agency's decision whether a reinvestigation is warranted under the Act.

(5) The head of the agency or a designee shall be the final arbiter of the complaint and there shall be no judicial review of that person's final decision.

(6) An officer or employee of the agency who has failed to comply with the Act may be required to undergo retraining or additional training. All disciplinary actions authorized by the agency or the Department of Justice may be taken, as appropriate, including suspension or termination from employment, for officers or employees of the agency who are determined to have willfully or wantonly failed to comply with the Act.

(7) The provisions of paragraph (b) of this section do not authorize the agency to exercise authority over, take disciplinary action against, or involve in its complaint or disciplinary processes, an officer or employee of another agency.

#### **§ 95.10 Data collection.**

(a) *Publication of statistics.* Not later than August 3, 2025, and annually thereafter, the National Institute of Justice shall publish statistics on the number of cold case murders. The Attorney General may delegate this function to the Bureau of Justice Statistics or another component of the Department of Justice.

(b) *Content of published statistics.* The statistics published pursuant to paragraph (a) of this section shall, at a minimum, be disaggregated by the circumstances of the cold case murder, including the classification of the offense, and by agency.

(c) *Annual publications.* The statistics published in each year shall provide the required information for—

(i) Cold case murders in which the murder occurred after the enactment of the Act and no likely perpetrator was identified by the end of the preceding year; and

(ii) Cold case murders in which an application for review under § 95.3(a) was filed before the end of the preceding year and no likely perpetrator was identified by the end of that year.

### **§ 95.11 Annual report.**

(a) *In general.* The Act provides that each agency shall submit an annual report to the Committees on the Judiciary of the House of Representatives and of the Senate describing actions taken and results achieved under this Act during the previous year. This requirement applies to any agency that may be the principal investigative agency in a murder investigation. An individual agency need not submit a separate report if the required information with respect to the agency is included in a report submitted to the Committees by another organizational unit of the government.

(b) *Contents of report.* The Act provides that the report described in paragraph (a) of this section shall include—

(1) The number of written applications filed with the agency pursuant to section 2(a) of the Act and § 95.3(a);

(2) The number of extensions granted, and an explanation of reasons provided under section 2(h) of the Act and § 95.4(d);

(3) The number of full reinvestigations initiated and closed pursuant to section 4 of the Act and § 95.5; and

(4) Statistics and individualized information on topics that include identified suspects, arrests, charges, and convictions for reviews under section 2 of the Act and § 95.3 and reinvestigations under section 4 of the Act and § 95.5.

### **§ 95.12 Withholding information.**

Nothing in the Act or this part requires an agency to provide information that would endanger the safety of any person, unreasonably impede an ongoing investigation, violate a court order, or violate legal obligations regarding privacy.

Dated: January 13, 2025.

Merrick B. Garland,

Attorney General.