

that have initially been processed and negotiated by a non-appropriated fund activity, its insurer, or TPA, until the activity or its insurer has clearly stated in writing that it does not intend to pay the claim and has elected to defend the claim in court.

[72 FR 53426, Sept. 19, 2007]

§ 756.9 Claims by employees.

(a) *Property.* Claims by employees of NAFIs for loss, damage, or destruction of personal property incident to their employment shall be processed and adjudicated in accordance with subparts A or B of part 751 of this chapter, as appropriate. The claims will then be forwarded to the appropriate NAFI for payment from non-appropriated funds.

(b) *Personal injury or death—(1) Personal injury or death of citizens or permanent residents of the United States employed anywhere, or foreign nationals employed within the United States.* Compensation is provided by the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901–950) for employees of NAFIs who have suffered injury or death arising out of, and in the course of, their employment (5 U.S.C. 8171). That Act is the exclusive basis for Government liability for such injuries or deaths that are covered (5 U.S.C. 8173). A claim should first be made under that Act if there is a substantial possibility the injury or death is covered under the Act's provisions.

(2) *Personal injury or death of foreign nationals employed outside of the continental United States.* Employees who are not citizens or permanent residents, and who are employed outside the continental United States, may be protected by private insurance of the NAFI or by other arrangements. When a non-appropriated fund activity has elected not to obtain insurance coverage or to make other arrangements, compensation is separately provided by Federal statute, military regulations, and agreements with foreign countries. See 5 U.S.C. 8172, DoD 1401.1–M, Personnel Policy Manual for Non-appropriated Fund Instrumentalities and BUPERINST 5300.10A, NAF Personnel Manual.

[72 FR 53426, Sept. 19, 2007]

PART 757—AFFIRMATIVE CLAIMS REGULATIONS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 939, 5013, and 5148; E.O. 11476, 3 CFR, 1969 Comp., p. 132; 32 CFR 700.206 and 700.1202.

SOURCE: 57 FR 5072, Feb. 12, 1992, unless otherwise noted.

Subpart A—Property Damage Claims

§ 757.1 Scope of subpart A.

Subpart A describes how to assert, administer, and collect claims for damage to or loss or destruction of Government property through negligence or wrongful acts.

§ 757.2 Statutory authority.

(a) *General.* All affirmative claims for damage to or loss of Government property in favor of the United States are processed in accordance with the Federal Collections Claims Act (31 U.S.C. 3711), as amended by the Debt Collection Act of 1982, PL 97–365, 96 Stat. 1749 (25 October 1982), PL 101–552, 104 Stat. 2736 (15 November 1990) and the Debt Collection Improvement Act of 1996, PL 104–134, 110 Stat. 1321, 1358 (26 April 1996). Department of Defense Directive designees, the authority granted to the

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Secretary of Defense under the Federal Claims Collection Act.

(b) *Statute of limitations.* Subject to specific provisions in other statutes, there is a general 3-year statute of limitations on affirmative Government tort claims pursuant to 28 U.S.C. 2415(b).

[72 FR 53427, Sept. 19, 2007]

§ 757.3 Regulatory authority.

The regulations published in 31 CFR Chapter IX control the collection and settlement of affirmative claims. This section supplements the material contained in those regulations. Where this section conflicts with the materials and procedure published in 31 CFR Chapter IX, the latter controls.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53427, Sept. 19, 2007]

§ 757.4 Claims that may be collected.

(a) *Against responsible third parties for damage to Government property, or the property of non-appropriated fund activities.* It should be noted, however, that as a general rule, the Government does not seek payment from service members and Government employees for damages caused by their simple negligence while acting within the scope of their employment. Exceptions to this general policy will be made when the incident involves aggravating circumstances.

(b) *For money paid or reimbursed by the government for damage to a rental car in accordance with the Joint Federal Travel regulations (volume 1, paragraph U 3415-C and volume 2, paragraph C 2101-2).* Collection action shall be taken against third parties liable in tort. Collection action shall not be taken against Government personnel who rented the vehicle.

(c) *Other claims.* Any other claim for money or property in favor of the United States cognizable under the Federal Claims Collections Act not specifically listed above.

[72 FR 53427, Sept. 19, 2007]

§ 757.5 Assertion of claims and collection procedures.

(a) *General.* The controlling procedure for administrative collection of

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claims are established in 31 CFR part 901.

(b) *Officials authorized to pursue claims.* The Judge Advocate General; the Deputy Judge Advocate General; any Assistant Judge Advocate General; the Deputy Assistant Judge Advocate General (Claims and Tort Litigation) are authorized to pursue and collect all affirmative claims in favor of the United States, except in countries where another service has single service responsibility in accordance with DoD Directive 5515.8.

(c) *Dollar limitations.* All of the officers listed in § 757.5(b) are authorized to compromise and terminate collection action on affirmative claims of \$100,000.00 or less.

(d) *Determining liability.* Liability must be determined in accordance with the law of the place in which the damage occurred, including the applicable traffic laws, elements of tort, and possible defenses.

(e) *Assertion of a claim.* (1) Assertion of the claim is accomplished by mailing to the tortfeasor a "Notice of Claim." The notice is to be mailed certified mail, return receipt requested, and should include the following information:

(i) Reference to the statutory right to collect;

(ii) A demand for payment or restoration;

(iii) A description of damage and estimate of repair;

(iv) A description of the incident, including date and place; and

(v) The name, phone number, and office address of the claims personnel to contact.

(2) See also 31 CFR part 901.

(f) *Full payment.* When a responsible party or insurer tenders full payment or a compromise settlement on a claim, the payment should be in the form of a check or money order made payable to "United States Treasury." The check or money order shall then be forwarded to the disbursing officer serving the collecting activity for deposit in accordance with the provisions of the Navy Comptroller Manual. For collections for damages to real property, the collection is credited to the account available for the repair or replacement of the real property at the

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time of recovery. (10 U.S.C. 2782.) For damages to personal property, the money is returned to the general treasury.

(g) *Installment payments.* See 31 CFR 901.8 for specific procedures. In general, if the debtor is financially unable to pay the debt in one lump sum, an installment payment plan may be arranged. Installment payments will be required on a monthly basis and the size of payment must bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment agreements should specify payments of such size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than \$50.00 per month should be accepted only if justified on the grounds of financial hardship or for some other reasonable cause. In all installment arrangements, a confession of judgment note setting out a repayment schedule should be executed.

(h) *Damage to nonappropriated-fund instrumentality (NAFI) property.* Any amount collected for loss or damage to property of a NAFI shall be forwarded to the headquarters of the non-appropriated-fund activity for deposit with that activity. In those situations where the recovery involves damage to both NAFI-owned property and other Government property, e.g., destruction of an exchange building resulting in damage to both the building and the exchange-owned property inside, recovery for the exchange-owned property shall be forwarded to the NAFI. Recovery for building damage shall be deposited in accordance with § 757.5(f) above.

(i) *Damage to industrial-commercial property.* When a loss or cost of repair has been borne by an industrial-commercial activity, payment shall be deposited in the Navy Industrial Fund of the activity in accordance with the provisions of the Navy Comptroller Manual. When a claim is based on a loss or damage sustained by such an activity, a notation to this effect shall be included in any claim file forwarded to the Judge Advocate General.

(j) *Replacement in kind or repair.* The responsible party, or insurer, may want to repair or replace in kind damaged property. The commanding officer or officer in charge of the activity sus-

taining the loss is authorized to accept repair or replacement if, in his discretion, it is considered to be in the best interests of the United States.

(k) *Release.* The Supervisory Attorney, Tort Claims Unit, Norfolk is authorized to execute a release of the claim when all repairs have been completed to the Government's satisfaction, and when all repair bills have been paid. No prior approval from the Judge Advocate General is required for this procedure. If repair or replacement is made, a notation shall be made in any investigation or claims file.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53427, Sept. 19, 2007]

§ 757.6 Waiver, compromise, and referral of claims.

(a) *Officials authorized to compromise claims.* The officers identified in § 757.5(b) may collect the full amount on all claims, and may compromise, execute releases or terminate collection action on all claims of \$20,000.00 or less. Collection action may be terminated for the convenience of the Government if the tortfeasor cannot be located, is found to be judgment-proof, has denied liability, or has refused to respond to repeated correspondence concerning legal liability involving a small claim. A termination for the convenience of the Government is made after it is determined that the case does not warrant litigation or that it is not cost-effective to pursue recovery efforts.

(b) *Claims over \$100,000.00.* Claims in excess of \$100,000.00 may not be compromised for less than the full amount or collection action terminated without approval from the Department of Justice (DOJ).

(c) *Notification.* The Judge Advocate General shall be notified prior to all requests made to the DOJ to compromise, terminate collection, or referral for further collection action or litigation.

(d) *Litigation reports.* Litigation reports prepared in accordance with 31 CFR part 904 shall be forwarded through the Judge Advocate General (Claims and Tort Litigation) to the Department of Justice along with any case file for further collection action

or litigation as required by the Federal Claims Collections Standards.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

§§ 757.7–757.10 [Reserved]

Subpart B—Medical Care Recovery Act (MCRA) Claims and Claims Asserted Pursuant to 10 U.S.C. 1095

§ 757.11 Scope of Subpart B.

Subpart B describes the assertion and collection of claims for medical care under the MCRA and 10 U.S.C. 1095. The MCRA states that when the Federal government provides treatment or pays for treatment of an individual who is injured or suffers a disease, the Government is authorized to recover the reasonable value of that treatment from any third party who is legally liable for the injury or disease. Title 10 U.S.C. 1095 provides for the collection from third-party payers for the value of health care services incurred by the Government on behalf of covered beneficiaries.

[72 FR 53428, Sept. 19, 2007]

§ 757.12 Statutory authorities.

(a) *Medical Care Recovery Act*, 42 U.S.C. 2651–2653 (2005).

(b) *Title 10 U.S.C. 1095* (Health Care Services Incurred on Behalf of Covered Beneficiaries: Collection from Third-Party Payers).

(c) *Title 10 U.S.C. 1079a* (CHAMPUS: Treatment of Refunds and Other Amounts Collected).

[72 FR 53428, Sept. 19, 2007]

§ 757.13 Responsibility for MCRA actions.

(a) *JAG designees*. (1) Primary responsibility for investigating, asserting, and collecting Department of the Navy (DON) MCRA claims and properly forwarding MCRA claims to other Federal departments or agencies rests with the following personnel:

(i) Deputy Assistant Judge Advocate General (Claims and Tort Litigation Division) (Code 15); and the

(ii) Commanding Officer, Naval Legal Service Command Europe and South-

west Asia (NLSC EURSWA), Naples, Italy, in its area of geographic responsibility.

(2) JAG designee may assert and receive full payment on any MCRA claim. Code 15 may agree to compromise or waive claims for \$100,000 or less. NLSC EURSWA may agree to compromise or waive claims for \$40,000.00 or less. NLSC EURSWA claims in excess of \$40,000.00 may be compromised or waived only with Code 15 approval. See Sec. 757.19 for further discussion of waiver and compromise.

(b) *Navy Medical Treatment Facility (MTF)*. (1) Naval MTFs are responsible for ensuring potential MCRA/10 U.S.C. 1095 claims are brought to the attention of the appropriate JAG designee.

(2) The MTF reports all potential MCRA/10 U.S.C. 1095 cases by forwarding a copy of the daily injury log entries and admission records to the cognizant JAG designee within 7 days of treatment for which a third party may be liable. The JAG designee makes the determination of liability. Recovery for the costs of MTF care is based on Diagnostic Related Group rates or a Relative Value Unit. Rates are established by the Office of Management and Budget and/or the DoD, and published annually in the FEDERAL REGISTER.

(c) *TRICARE Fiscal Intermediary*. The TRICARE fiscal intermediary is required to identify and promptly mail claims involving certain diagnostic codes to the cognizant JAG designee. Claims are asserted for the actual amount that TRICARE paid.

(d) *Department of Justice (DoJ)*. Only the DoJ may authorize compromise or waiver of an MCRA/10 U.S.C. 1095 claim in excess of \$100,000.00 or settle an MCRA/10 U.S.C. 1095 claim in which the third party has filed a suit against the United States as a result of the incident which caused the injury and upon which the claim is based.

[72 FR 53428, Sept. 19, 2007]

§ 757.14 Claims asserted.

(a) *General*. The DoN asserts MCRA and 10 U.S.C. 1095 claims when medical care is furnished to Navy and Marine Corps active duty personnel, retirees, or their dependents, or any other person when appropriate, and third-party

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tort or contract liability exists for payment of medical expenses resulting from an injury or disease. Claims are asserted when the injured party is treated in a MTF or when the DoN is responsible for reimbursing a non-Federal care provider.

(b) *Independent cause of action.* The MCRA creates an independent cause of action for the United States. The Government can administratively assert and litigate MCRA claims in its own name and for its own benefit. Procedural defenses, such as a failure of the injured person to properly file and/or serve a complaint on the third party, that may prevent the injured person from recovering, do not prevent the United States from pursuing its own action to recover the value of medical treatment provided to the injured person. The right arises directly from the statute; the statutory reference to subrogation pertain only to one mode of enforcement. In creating an independent right in the Government, the Act prevents a release given by the injured person to a third party from affecting the Government's claim.

(c) *Liable parties.* MCRA and 10 U.S.C. 1095 claims may be asserted against individuals, corporations, associations and non-Federal Government agencies subject to the limitation described in § 757.15.

(d) *Reasonable value of medical care.* The reasonable value of medical care provided to an injured person is determined:

(1) By using the rate set as described in § 757.13 (b)(2) in bills issued by the MTF; or

(2) By the actual amount paid by the Federal Government to non-Federal medical care providers.

(e) *Alternate theories of recovery.* (1) Often, recovery under the MCRA is not possible because no third-party tort liability exists. For example, if a member, retiree, or dependent is driving a vehicle and is injured in single-car accident, there is no tortfeasor. Title 10 U.S.C. 1095 provides the Government alternate means for recovery as a third-party beneficiary of an insurance contract of the injured party.

(2) Recovery may also be possible under State workers' compensation laws. Case law in this area is still

emerging, but in most jurisdictions, the United States stands in the position of a lien claimant for services rendered.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

§ 757.15 Claims not asserted.

In some cases, public policy considerations limit the DoN's assertion of claims against apparent third-party tortfeasors or a contract where the Government would be a third party beneficiary. Claims are not asserted against:

(a) *Federal Government agencies.* Claims are not asserted against any department, agency or instrumentality of the United States. "Agency or instrumentality" includes self-insured, non-appropriated-fund activities but does not include private associations.

(b) *Injured service members, dependents, and employees of the United States.* Claims are not asserted directly against a servicemember, the dependent of a servicemember, or an employee of the United States who is injured as a result of his own willful or negligent acts. The United States does assert, however, against policies that cover the injury.

(c) *Employers of merchant seamen.* Claims are not asserted against the employer of a merchant seaman who receives Federal medical care under 42 U.S.C. 249.

(d) *Department of Veterans' Affairs care for service-connected disability.* Claims are not asserted for care provided to a veteran by the Department of Veterans' Affairs when the care is for a service-connected disability. The United States will, however, claim for the reasonable value of care provided an individual before he is transferred to a Department of Veterans' Affairs hospital. This policy does not apply in cases where the MTF referred the patient to the Veterans' Affairs hospital and then paid for the care.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53428, Sept. 19, 2007]

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§ 757.16 Claims asserted only with OJAG approval.

(a) *Certain Government contractors.* JAG approval is required before asserting a claim against a Federal government contractor when the contract provides that the contractor will be indemnified or held harmless by the Federal government for tort liability.

(b) *U.S. personnel.* JAG approval is required before asserting MCRA claims directly against servicemembers, their dependents and federal employees and their dependents for injury to another person. No approval is necessary to assert claims against their insurance policies, however, except for injuries caused by servicemembers and federal employees acting “within the scope of their employment.” Intra-familial tort immunity would not preclude the Government from asserting any claims for care furnished to a tortfeasor’s family members.

[72 FR 53429, Sept. 19, 2007]

§ 757.17 Statute of limitations.

(a) *Federal.* Claims asserted under the MCRA or against an automobile liability insurer through 10 U.S.C. 1095 are founded in tort and must be brought within 3 years after the action “first accrues” (28 U.S.C. 2415b). Normally, a medical care claim “first accrues” on the initial date of treatment.

(b) *Claims asserted under 10 U.S.C. 1095.* Although legal arguments can be made that claims asserted under 10 U.S.C. 1095 against a no-fault or personal injury protection insurer are founded in contract and can be brought within 6 years (28 U.S.C. 2415a), all claims should be asserted within 3 years of the date when the claim accrued. However, some states require notice of such claims to be filed within a shorter period of time.

[72 FR 53429, Sept. 19, 2007]

§ 757.18 Asserting the claim.

(a) *Initial action by the JAG designee.* When advised of a potential claim, the JAG designee will determine the Federal agency or department responsible for investigating and asserting the claim.

(1) When DoN has reimbursed a non-Federal provider for health care, or

when TRICARE has made payment for a Navy health care beneficiary, the JAG designee will assert any resulting claim.

(2) When care is provided in a Federal treatment facility, the status of the injured person will determine the agency that will assert a resulting claim. Cost of treatment provided or paid for by an MTF is deposited in that MTF’s account, regardless of which service is making the collection.

(i) Where DoN members, retirees, or their dependents receive medical treatment from another Federal agency or department, the DoN will assert any claim on behalf of the United States based on information provided by the treating agency or department.

(ii) Similarly, where a DoN MTF provides care to personnel of another Federal agency or department, that other agency or department will assert any claim on behalf of the United States.

(3) If the claim is one which the DoN should assert, the JAG designee will forward all available information to the appropriate department or agency.

(4) If the claim is one which the DoN should assert, the JAG designee will ensure an appropriate investigation into the circumstances underlying the claim is initiated and will provide notice to the injured party and all third parties who may be liable to the injured person and the United States under the MCRA or 10 U.S.C. 1095.

(b) *Investigating the claim.* While there is no prescribed form or content for investigating these claims, the claims file will contain sufficient information on which to base valuation, assertion, settlement, waiver, and/or compromise decisions.

(c) *Notice of claim.* (1) The JAG designee will assert claims by mailing a notice of claim to identified third-party tortfeasors and their insurers or insurers for third-party beneficiary coverage. Many insured tortfeasors fail to notify their insurance companies of incidents. This failure may be a breach of the cooperation clause in the policy and may be grounds for the insurer to refuse to defend the insured or be responsible for any liability. The United States, as a claimant, may preclude such an invocation by giving the requisite notification itself. The purpose

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of the insurance clause is satisfied if the insurer receives actual notice of the incident, regardless of the informant. This notice should be mailed as soon as it appears an identified third party may be liable for the injuries. The prompt assertion of the claim will ensure that the government is named on the settlement draft. If the United States is not so named, and the claim has been asserted, the insurer settles at its own risk.

(2) The JAG designee will also notify the injured person or his legal representative of the Government's interest in the value of the medical care provided by the United States. This notice will advise that:

(i) The United States may be entitled to recover the reasonable value of medical care furnished or paid by the Federal government;

(ii) The injured person is required to cooperate in the efforts of the United States to recover the reasonable value of medical care furnished or paid for by the Federal government;

(d) *Administering the claim.* (1) After investigating and asserting the claim, the JAG designee will maintain contact with all parties, their legal representatives, and insurers.

(2) An effort should be made to coordinate collection of the Federal government's interest with the injured person's action to collect on a claim for damages.

(i) Attorneys representing an injured person may be authorized to include the Federal government's claim as an item of special damages with the injured person's claim or suit.

(ii) An agreement that the Government's claim will be made a party of the injured person's action should be in writing and state the counsel fees will not be paid by the Government or computed on the basis of the Government's portion of recovery.

(3) If the injured person is not bringing an action for damages or is refusing to include the Federal Government's interest, the JAG designee will pursue independent collection. The United States is specifically allowed to intervene or join in any action at law brought by or through the injured person against the liable third person or brings an original suit in its own name

or in the name of the injured person. The JAG designee will ensure all parties are aware that the United States must be a party to all subsequent collection negotiation.

(4) When the Government's interests are not being represented by the injured person or his/her attorney, and independent collection efforts have failed, the JAG designee will refer the claims to the DoJ for possible suit.

(e) *Access to DoN records and information.* (1) Copies of medical records in cases that have potential claims will be sent by the MTFs to the cognizant JAG designee. It is considered a routine use of the records for the JAG designee to release them to an insurance company, if requested, in order to substantiate the claim. However, only the MTF as "keepers of the records" has the authority to make official releases of medical records to anyone else. Records will be protected in accordance with the provisions of the Privacy Act, 5 U.S.C. 552a, and confidentiality of quality assurance medical records, 10 U.S.C. 1102. Non-routine release requires the authorization from the injured individual or legal representative or an order from a court of competent jurisdiction. A clerk or attorney signed subpoena is not "an order from a court of competent jurisdiction." Subpoenas are processed in accordance with 32 CFR part 725.

(2) Requests for testimony of any Navy employees will be processed in accordance with DoD Directive 5405.2, 32 CFR part 725, and SECNAVINST 5820.8A. If the injured person, or his or her attorney has signed an agreement to protect the Government's interest and is requesting the testimony of a locally available physician who treated the injured person, however, this request falls within an exception to the regulations. See 32 CFR 725.5(g)(3). In this situation, the injured person or the attorney need only ask the JAG designee for assistance in scheduling the testimony of the treating physician and the JAG designee will coordinate with the physician's command to determine availability. Such testimony is limited to factual issues. The definition of factual issues is slightly different under the regulations than it is in civil litigation. Opinions that are

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formed prior to, or contemporaneously with, the treatment at issue and are routinely required in the course of the proper performance of professional duties constitute essentially factual matters. For example, the physician will have opined at the time of treatment if further treatment will be necessary. The physician may testify to that as factual, not opinion, testimony. Opinions that are formed after treatment and are not required for continuing treatment, especially those that respond to hypothetical questions, are not factual and are considered to be expert testimony. This expert testimony, regardless of who requests it, will be processed in accordance with 32 CFR part 725, and must be forwarded to OJAG Code 14, General Litigation Division. Requests for expert testimony are rarely granted.

[72 FR 53429, Sept. 19, 2007]

§ 757.19 Waiver and compromise.

(a) *General.* OJAG Code 15 (Claims and Tort Litigation) may authorize waiver or compromise of any claim that does not exceed \$100,000.00. NLSO EURSWA may agree to compromise or waive claims for \$40,000.00 or less. NLSO EURSWA claims in excess of \$40,000.00 may be compromised or waived only with Code 15 approval.

(b) *Waiver and compromise.* The JAG designee may waive the Federal government's MCRA interest when a re-

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sponsible third-party tortfeasor cannot be located, is judgment proof, or has refused to pay and litigation is not feasible. Waiver or compromise is also appropriate when, upon written request by the injured person or legal representative, it is determined that collection of the full amount of the claim would result in undue hardship to the injured person. In assessing undue hardship, the following should be considered:

- (1) Permanent disability or disfigurement;
- (2) Lost earning capacity;
- (3) Out-of-pocket expenses;
- (4) Financial status;
- (5) Disability, pension and similar benefits available;
- (6) Amount of settlement or award from third-party tortfeasor or contract insurer; and
- (7) Any other factors which objectively indicate fairness requires waiver.

[57 FR 5072, Feb. 12, 1992, as amended at 72 FR 53430, Sept. 19, 2007]

§ 757.20 Receipt and release.

The JAG designee will execute and deliver appropriate releases to third parties who have made full or agreed upon compromised payments. A copy of the release will be kept in the claims file.

[72 FR 53430, Sept. 19, 2007]