

## Structuring Loan Forbearance Agreements

By **Terry Cawley**, Claims Attorney

In the current lending environment, the number of real estate loans in default obviously has increased significantly. This is true not only of residential real estate loans, but also commercial real estate ("CRE") loans. Your bank should seek the opinion of its legal counsel in the course of negotiating a possible forbearance agreement with a CRE borrower. Consider the following practice to improve your bank's risk profile if, despite enjoying a period of forbearance, the borrower breaches its obligations under a forbearance agreement.

Attorneys for some of our insured banks make sure to include in the forbearance agreement a clause which states that, as a condition precedent to the bank's agreement to forbear from its remedies, the borrower must grant to the bank a release and a waiver of any legal cause of action or claim that the borrower may have in connection with the loan that is in default. Such a release can be drafted to release the bank, as well as its officers, directors, employees, and agents, from any claims that arise out of or relate in any way to the making of the original loan, the transactions pertaining to the loan, and the forbearance agreement itself. Provisions such as these may even be employed in so-called "discussion letters," which contain agreements pertaining to, and inducing a lender to engage in, discussions of possible forbearance. The lender's counsel drafts such a discussion letter, and the borrower signs and returns it, as consideration for the discussions of forbearance to follow.

Ordinary principles of freedom of contract dictate that such provisions are, and ought

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Banks that are ABA members and insured by Progressive automatically become owners in the American Bankers Professional and Fidelity Co., Ltd (ABPFIC) and receive annual profit-sharing checks based on the program's successful results. "Our program is the only one of its kind that distributes profits directly to member banks," boasts ABPFIC Chairman John Manor. Since 1991, ABPFIC has declared \$67,500,000 in profits shared by community banks. **Checks will be distributed by April 1.**

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The eRisk Helpline and Web site are available at no additional charge to banks that purchase IBL insurance from Progressive. The Helpline provides expert assistance in dealing with a security breach.

If you are an IBL customer, visit [banks.progressive.com](http://banks.progressive.com) to access the eRisk Hub Web site. You should have received a reference card with your access code in the mail. If not, call Nicole Reese at 800-274-5222.

If your bank has not purchased IBL insurance, speak with your agent or underwriter about this important coverage.

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For more loss control information or to view this SafeTalk<sup>®</sup> newsletter online, visit [banks.progressive.com](http://banks.progressive.com).

# Background Checks: Understanding the Fair Credit Reporting Act

By **Katie Hartley**, Accurate Background, Inc.

For many human resource professionals and business owners, the Fair Credit Reporting Act (FCRA) and what it means for their organization can be confusing. At the very basic level, the FCRA is the federal law that governs any information provided by a consumer reporting agency (CRA). A CRA is defined as any entity that assembles reports on individuals for other businesses—such as your background screening provider. The FCRA, enacted in 1970, provides important requirements for credit reports, consumer investigative reports, and employment background checks.

Bottom line, the FCRA is there to protect the job applicant (consumer) as well as your organization. If you are conducting background checks on your job applicants and you are using a third party background screening provider, you are required to be compliant with the FCRA.

The cost of non-compliance can add up quickly. Job applicants may seek a maximum of \$1,000 in statutory damages in addition to actual damages, punitive damages, and reasonable attorney fees for willful noncompliance with the Act.

Your background screening provider should supply the necessary tools and education regarding the FCRA to enable your organization to maintain compliance with this important legislation. To ensure compliance, follow these basic steps:

## **Step One: Permissible Purpose**

To start, your organization must have a “Permissible Purpose” for running the background check as defined under Section 604 of the FCRA. The defined permissible purposes include, but are not limited to, employment purposes.

## **Step Two: Disclosure and Authorization**

Disclosure and authorization are required steps before initiating a background check on any individual. The Disclosure and

Authorization Form is used as the applicant’s signed authorization for the background check. The applicant must receive the following before a background check can be conducted:

- › Background “D&A” Form (signed and returned by applicant)
- › Summary of Rights Under the FCRA

Regardless of your hiring decision, the signed D&A Form should be kept on file for a minimum of five years as allowed under the federal statute of limitations for civil filings of non-compliance.

*If employment is denied in whole or in part based on the results of the background check, the following steps are required:*

## **Step Three: Pre-Adverse Action Notification**

A Pre-Adverse Action letter must be sent to the applicant. With this letter, a copy of the completed background check report as well as the Summary of Consumer Rights under the FCRA must be included. Information regarding the hiring decision cannot be disclosed in this notification.

## **Step Four: Adverse Action Notification**

Following the Pre-Adverse Action letter, an Adverse Action notification must be sent to the applicant. The final decision to deny employment based on the results of the background check is disclosed in this notification. This letter must include a copy of the completed background check report and the Summary of Consumer Rights under the FCRA.

Pre-Adverse and Adverse Action letters give the applicant the opportunity to dispute information provided in their report that they believe is erroneous. These steps were designed to protect applicants from mistakes stemming from human error, mistaken identity, outdated information, etc. Both of these letters must include contact information for your background screening provider in case your applicant has any reason to question the background screening results.

Although the steps required by the FCRA can be cumbersome, the protection provided by this legislation is absolutely necessary. It not only protects your job applicants from denied employment based on inaccurate information, it also protects your organization from unnecessary litigation as a result of non-compliance. All background screening providers should be well prepared for questions regarding the FCRA and be able to provide your organization with the tools needed to maintain compliance.

Please note: The above steps only summarize the Federal law surrounding background checks. For information regarding various state laws or to obtain additional information regarding the FCRA, please consult with your legal counsel or contact your background screening provider.

**Accurate Background, Inc.** is a nationwide technology leader in the background screening field. In 2008, they ranked for the third year in a row on Deloitte’s Technology Fast 500 and their pre-employment screening solution was awarded the American Bankers Association’s exclusive endorsement through the Corporation for American Banking. For more information, call 800-784-3911 or visit [www.accuratebackground.com](http://www.accuratebackground.com).

## **Did You Know?**

- › The FCRA applies to all background screening, not just screening which includes credit reports.
- › An employer must always disclose and obtain written authorization prior to the background investigation (unless it is a case of suspected wrong doing).
- › Many accurate background checks cannot be done instantly. Record searches at county courts must often be done in person to obtain current information.
- › Under the FACT Act, if an applicant or employee expresses any concern they may be a victim of identity theft, the background screening provider and/or your organization must provide them with the FDIC document titled, “Remedying the Effects of Identity Theft.”
- › Initial Notice is an optional step under the FCRA which can be used to notify employees and applicants that the employer conducts background screening. Methods for Initial Notice include: signs in the HR Department, and statement on the company Web site, job postings, etc.

# Congress Tells the Courts How to Interpret the ADA

By **Margaret Hart Edwards** and **Patrick F. Martin**, Shareholders, Littler Mendelson

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA), which will amend the Americans with Disabilities Act of 1990 (ADA) and directly overturn several decisions of the U.S. Supreme Court interpreting that landmark law. The ADAAA sends an unmistakable message to the courts that the concept of disability is to be more broadly, rather than narrowly, construed. The primary consequences of these amendments to employers is that far more people will fall within the definition of disability under the ADA. Specifically, the measures will increase coverage and strengthen employee protections under the ADA by:

- › rejecting the strict interpretation of the ADA that defines disability to be an impairment that prevents or severely restricts an individual from doing activities that are of central importance to one's daily life;
- › prohibiting the consideration of almost all measures that reduce or mitigate the impact of an impairment in the determination of whether an individual is disabled; and
- › allowing persons who are discriminated against on the basis of a perceived disability to pursue a claim under the ADA regardless of whether the perceived impairment limits or is perceived to limit a major life activity.

## **The ADAAA Rejects the Supreme Court's Strict Interpretation of the ADA as Setting a High Standard to Qualify as Disabled**

The major goal of the ADAAA is to undo current case law that, for the most part, creates a restrictive interpretation of the statute's definition of disability. The amendments specifically direct courts to instead construe the law in favor of "broad coverage of individuals under the ADA." The ADAAA overturns the Supreme Court decisions in *Sutton v. United Air Lines*, 527 U.S. 184 (1999), *Murphy v. United Parcel Service Inc.*, 527 U.S. 516, and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), in which the Court held that consideration must be given to mitigating measures that help individuals control impairments when determining whether persons are disabled under the ADA. This means that people who have successfully managed disabilities will still be covered by the ADA.

For example, in the *Murphy* case, Murphy had severe high blood pressure, but with medication, could function normally and engage in a full range of activities. Before the ADAAA, the law did not consider him to be disabled under the ADA because the use of medication controlled the effects of his high blood pressure. Murphy was prevented from pursuing an ADA claim after UPS found him unfit for his driver position because of his high blood pressure. The ADAAA now mandates that in determining whether an individual is disabled under the ADA, the person must be evaluated as if untreated, without considering the ameliorative effects of high blood pressure medication.

As a result of this change, the ADA will protect people whose cancer is in remission, whose diabetes is controlled by medication, whose seizures are prevented by medication, and who can function at a high level with learning disabilities. Employers will need to concentrate less on the threshold issue of disability, and focus more on their duty to provide reasonable accommodations. The ADAAA makes an exception for those who wear ordinary eyeglasses or contact lenses to correct vision to full acuity. These devices are not to be ignored in considering whether a person is disabled. Rather, they are to be taken into account, in all but rare cases. The purpose is to exclude from the definition of disability persons who simply need ordinary glasses to read, drive, etc.

## **The Scope of "Regarded as" Claims Has Been Both Clarified and Broadened**

The ADAAA further expands the ADA's definition of disability, specifically the "regarded as" prong of that definition, by now including persons that have been discriminated against because of an actual impairment or a perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." This is in stark contrast to the previous requirement expressed in the U.S. Supreme Court's opinion in *Sutton* that the perceived impairment must, like any actual impairment, substantially limit a major life activity. If a person is treated adversely (in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment) because of an actual perceived impairment, that is a violation of the law, irrespective of whether the impairment actually limits or is perceived to limit a major life activity. However, the ADAAA excludes from the "regarded as" definition of disability those impairments that are transitory and minor. *Transitory* is defined as "an impairment with an actual or expected duration of six months or less."

The ADAAA, however, limits the application of the ADA by clarifying that an employer's duty to accommodate does not extend to those individuals who make discrimination claims under the "regarded as" prong of the definition of disability. Before the ADAAA, there was a split among the federal courts as to whether the ADA's reasonable accommodation requirement applied to the "regarded as" category of disabled individuals. The ADAAA makes clear that employers have no duty to accommodate these individuals.

In short, the ADAAA clearly prohibits adverse employment actions based on myths, fears, and stereotypes when the person being discriminated against may not actually have an impairment, but is simply perceived to have one. As it is logically inconsistent to require reasonable accommodation of a misperceived impairment, the ADAAA clarifies that employers need not engage in the reasonable accommodation process with persons regarded as impaired, who are not actually impaired.

## The ADAAA Clarifies Other Aspects of the Definition of Disability

To further the goal of broadening the definition of disability, the ADAAA adopts several other provisions to guide the interpretation of the term disability. These include:

- › The ADAAA specifically adds a nonexclusive list of examples of major life activities to the language of the statute, and, in addition to the activities recognized in the regulations promulgated by the Equal Employment Opportunity Commission (EEOC), it adds the following: eating, sleeping, bending, reading, concentrating, thinking, and communicating. The ADA is also amended to now include a listing of examples of major bodily functions, which are considered major life activities. The ADAAA specifically rejects the restrictive interpretation of major life activity used by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
- › The ADAAA specifically includes as disabled those persons who have an impairment that is episodic or in remission, if the impairment would substantially limit a major life activity when active.
- › The ADAAA rejects the definition of “substantially limits” in the *Toyota* case, and in EEOC regulations that define “substantially limits” as “significantly restricted,” and directs the agency to revise its regulations to be consistent with the amendment’s goal of broadening the class of persons covered by the ADA. However, unlike some initial proposals regarding the amendments and at least two

current state laws, the ADA does not apply to persons who are simply “limited” due to a major life activity.

\* The ADAAA clarifies that an impairment that substantially limits one major life activity is enough. It need not limit more than one.

## There Is No Reverse Discrimination Under the ADA

The ADAAA states that there can be no claim of “reverse discrimination” under the ADA. Specifically, the ADAAA states that the ADA does not provide for a claim that an “individual was subject to discrimination because of the individual’s lack of disability.” “Reverse discrimination” claims have arisen in the context of an employer providing reasonable accommodation. This means that nondisabled persons cannot claim discrimination because they were treated less favorably or were not given the same accommodations.

For further information, call 888-LITTLER (548-8537) or e-mail [info@littler.com](mailto:info@littler.com).

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- If you have not received your user ID and password, please e-mail Nicole Reese, [nreese1@progressive.com](mailto:nreese1@progressive.com).

## Practical Steps for Employers

The ADAAA will be effective January 1, 2009. Overall, this law will not require major changes by most employers, but some practical steps for employers to take are listed below. Employers should:

1. Review their policies to make sure any definitions they use track the new law. Any handbook changes made should be communicated clearly to all employees. Most of the changes made in the amendments are legal clarifications of points that had been sources of controversy among lawyers, so it is unlikely that employers will need any major rewrite of policies.
2. Make sure that those in the organization who make decisions about accommodations, and human resources executives in particular, receive training to educate them about the changes in the ADA. These individuals need to understand the implications of the change in the definition of disability, and they should be highly aware of the “regarded as disabled” source of liability, so they avoid behaviors that might fall into this category.
3. Train persons in the company or organization who will be involved in the interactive discussions with employees potentially covered by the ADA. Those persons need to understand the comparative ease under which many additional people may now be covered by the law. They also need to know more about reasonable accommodations as many additional employees and applicants will have to be accommodated due to the amendments.
4. Expect more lawsuits to be filed. The ADAAA makes it easier for applicants and employees to make claims of disability discrimination. The defense of these suits will be more difficult, as the more expansive construction of the meaning of disabled will limit some frequently-used defenses available to employers.
5. Discuss the effects of these legal changes with legal departments and/or outside counsel. Through early discussion, inadvertent problems can be avoided. Time is of the essence as these amendments become effective January 1, 2009. Stated simply, planning avoids lawsuits.

## Commercial Construction Lending in a Tough Credit Market

By **Adam LaBoda**, Spencer Fane Britt & Browne LLP

Adam practices in Spencer Fane's Financial Services Group. His practice concentrates on regulatory and transactional banking matters, as well as workouts, bankruptcy, and other commercial transactions. He is also a frequent presenter on topics related to both banking and bankruptcy.

A bank's commercial construction lending portfolio often covers a wide variety of projects ranging from residential developments, apartments, condominiums and hotels, to office buildings and shopping centers. Every type of commercial construction project requires a borrower with requisite expertise and skills to construct and market the project. Accordingly, a bank's commercial construction lending team not only needs to believe the project is a viable one, but they must also have the requisite expertise and skill to help a borrower set up a feasible and manageable budget for the project. This will help to insure that the loan will accommodate both the project costs as well as reasonable cost overruns.

Once the decision has been made to lend, the commercial construction lending team must document the loan in a manner that allows the bank to step into the shoes of its borrower, so that if the borrower is unable to finish the project, the bank can complete it in order to maximize recovery on the loan. Proper documentation includes properly perfecting the bank's security interest in the borrower's real and personal property. However, whenever possible, banks should also get assignments of all licenses, plans, contracts, specs, and surveys.

Unlike many loans, construction loans require a lot of work on the part of the bank after the loan has closed. Constant review of the progress of the project is absolutely necessary to help insure the success of your borrower while insulating the bank from loss by spotting small problems before they become big problems.

It is important to:

- › review the budget with your borrower on a regular basis to make sure that initial projections remain on target;
- › visit the project on a regular basis to make sure that it is getting completed in the manner your borrower is representing to the bank;
- › make sure all contractors and material men are getting paid to avoid costly lien battles; and
- › communicate with your borrower and make sure they feel comfortable approaching the bank before they get in trouble in order to avoid major problems.

Sometimes major problems are inevitable. Current market conditions have slowed the construction industry as a whole. As a result, a lot of banks and their borrowers have found themselves in a defensive position trying to save their projects. Therefore, it has become all the more important to

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## Privacy Protection in Bankruptcy and Other Court Filings

By **Judith Yokaitis-Skutnik**, Assistant Claims Manager

When a borrower files for bankruptcy protection, a lender will typically file a proof of claim with the bankruptcy court to protect its interests. Lenders should be aware, however, that **bankruptcy courts now impose limits on certain information that can be disclosed in a filing, including a proof of claim.**

Proofs of claim and other bankruptcy filings are accessible to the public. In fact, most such documents can now be viewed on the Internet as well as at the courthouse. **To guard against disclosure of information that can facilitate identity theft, Bankruptcy Rule 9037 prohibits the disclosure of an individual's full Social Security number, taxpayer identification number, birth date, financial account number or, if the individual is a minor other than a debtor, name.**

To comply with the rule:

- > Use only the last four digits of a Social Security, taxpayer identification, or account number.
- > Use only the year of birth, rather than the full date.
- > Identify non-debtor minors by initials only.

These rules would also apply to any documents which may be filed with a proof of claim, such as account statements or promissory notes. Thus, it is necessary to review a document carefully to redact fully any prohibited information.

Federal district courts have similar rules. Many other courts have similar or additional rules. To ensure compliance with all privacy protection requirements in a specific court, it is advisable to consult with an attorney experienced in that jurisdiction.

Failure to comply with a court's privacy protection rules can result in sanctions from the court. It can also lead to claims against the bank for invasion of privacy, emotional distress, or other torts by the individual whose personal information was revealed.

## Commercial Construction Lending in a Tough Credit Market, continued

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understand supervisory and reporting requirements when assessing a troubled borrower and the options that may be available. Foreclosure is often not the best option and understanding how to work with a troubled borrower can help a bank avoid unnecessarily restricting the availability of credit to a generally viable borrower.

Workouts can be a good option when dealing with a troubled borrower in the construction industry. They can take a number of forms, including renewals or extensions, additional extensions of credit, formal term restructuring (with or without concessions), or in some cases foreclosure of all or part of the collateral. As with any credit, renewals, extensions, or restructuring must be based on sound underwriting standards and subject to normal loan classification rules.

However, a bank should not be criticized for continuing to carry a troubled loan as long as it has:

- › a well conceived and effective workout plan;
- › effective internal controls to manage the level of troubled loans;
- › classified the loan in cases where weakness exists; and
- › properly considered the loan when determining the level of the allowance for loan and lease losses.

The bottom line is that restructuring should be undertaken in a way that improves the likelihood that the loan will be repaid in full. With today's depressed real estate prices, foreclosure is often not going to be the best option. If times are tough, a good and well conceived workout strategy could be the best option for maximizing the bank's recovery on a given project.

Fear of regulatory criticism has caused many banks to hesitate to extend new loans or even renew or rework otherwise sound or potentially sound loans to borrowers in troubled industries, such as construction. The bottom line is that when bank management believes the renewal, extension, or restructuring of a credit is the best way to workout an existing troubled loan, potential regulatory criticism should not deter management from exercising its best judgment in order to minimize loss through less conventional means.

\*For further discussion, see the Comptroller's Handbook on Commercial Real Estate and Construction Lending.

## Structuring Loan Forbearance Agreements, continued

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to be, enforceable. Your bank's legal counsel will need to consult all relevant laws which may affect the use and enforceability of such a provision. Predictably, counsel for borrowers will consider whether to argue that such a provision should not be judicially enforced for one reason or another. Generally speaking, in most states an attack launched on the validity of such a provision ought to be difficult for a CRE borrower. CRE borrowers typically are sophisticated businessmen, and are adequately represented by independent legal counsel.

Bottom line: your bank should confer with its legal counsel and consider the use of such release and waiver language in a forbearance agreement entered into with a CRE borrower. When a borrower is considering a counterclaim in hopes of stalling or warding off your Bank's remedies, these release and waiver provisions can improve your Bank's risk profile and its collection prospects.

### TAKE ADVANTAGE OF ABA FRONTLINE COMPLIANCE TRAINING

More than 70 online courses available to ABA members and non-members

Ongoing employee training on bank regulatory compliance is essential. Yet changing regulations and high staff turnover make it difficult to implement and maintain. To address this issue, the American Bankers Association (ABA) launched ABA Frontline Compliance, a training program that is free to member banks and also available at a low cost to non-members.

Enrolled banks have unlimited access to more than 70 self-paced online courses, developed with senior industry compliance experts, to train tellers, customer service representatives, personal bankers, call center representatives, consumer lenders, and non-compliance managers. This program trains frontline employees on how the various compliance regulations impact their jobs.

ABA Frontline Compliance Training also gives banks the ability to track and document participants' results, a feature appreciated by bank regulators.

For a full list of compliance training courses or an online preview, visit [www.abafrontline.com](http://www.abafrontline.com). To enroll, call 800-BANKERS or visit the Web site. This program is free to ABA member banks. For non-members, fees start at \$50 per employee and decline as the number of employees increases.

## Reclamation Rule for Treasury Checks Heightens Fraud Exposure

Be aware that the government has a 60-day period to reclaim funds for fraudulent checks, allowing a long lead time for a thief to disappear with misappropriated funds—as in the following case:

A new customer opened a corporate account at a bank's brokerage arm with a \$159,000 IRS Treasury Check, payable to the corporation. The brokerage did its due diligence and even contacted the Treasury to determine that the check number was valid. The account was opened in the same name as the payee on the check. The customer provided all the required paperwork, including the incorporation papers and the corporate resolution authorizing him to set up the account, authorize trading, and be the signatory. He provided his driver's license, a Social Security card, and everything else that was required.

The brokerage sent the check through their correspondent bank, and the Treasury cleared the check. After a two-week hold, the check was released and the customer transferred \$95,000 electronically to an overseas account. Suspicious of the account activity, an employee contacted the Treasury, where it was confirmed that although the deposited check number was valid, both the payee and the amount had been altered. Treasury reclaimed the amount of the check, but the bank had already released the funds to a foreign bank account, which had been cleared out.

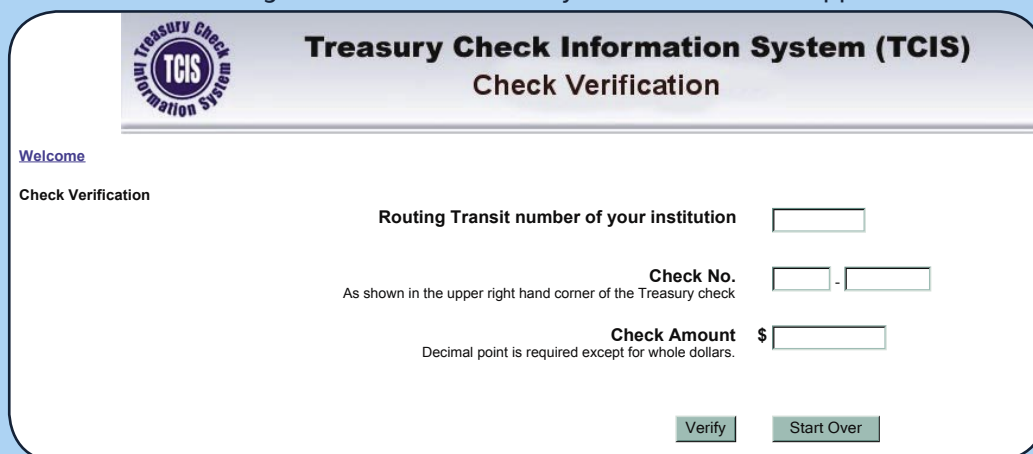
Under Reg 31 CFR § 240.6, a government check is only provisionally paid, and not finally paid, until 60 days after presentment. Despite the fact that the Treasury provisionally cleared the check in this case, it lawfully reclaimed the funds within the 60-day period and the bank sustained the loss. To prevent a loss at your bank:

- **Remind your employees that large Treasury checks, foreign checks (especially Canadian), and any checks that look suspicious require special handling.**
- **A phone call to verify the legitimacy of a check can prevent significant losses. Be sure to verify both the amount and, where possible, the payee, as these fields can be easily altered. *Unfortunately, payee cannot be verified on Treasury checks.***
- **Post a copy of the Treasury Check Security Features (see reverse side), also available at [tcva.fms.treas.gov](http://tcva.fms.treas.gov).**

### HOW TO VERIFY TREASURY CHECKS

To verify a Treasury check:

1. Go to [tcva.fms.treas.gov](http://tcva.fms.treas.gov) to access the Treasury Check Verification Application:



The screenshot shows the 'Treasury Check Information System (TCIS) Check Verification' web application. It features a header with the TCIS logo and title. Below the header, there is a 'Welcome' message and a 'Check Verification' section. This section contains three input fields: 'Routing Transit number of your institution', 'Check No.' (with a note: 'As shown in the upper right hand corner of the Treasury check'), and 'Check Amount \$' (with a note: 'Decimal point is required except for whole dollars.'). At the bottom of the form are two buttons: 'Verify' and 'Start Over'.

2. Input (1) the Federal Routing #, (2) the check and symbol numbers, and (3) the amount of the check.
3. The Web site will verify whether: (1) it has already been paid; (2) it has not yet been paid; or (3) there is no such issue (number and amount don't match). Unfortunately, due to privacy issues, they will not verify payee.

Financial Management Services (FMS) is the primary disbursing officer of payments to individuals on behalf of federal agencies. In case of a problem check, contact the FMS QUESTIONED DOCUMENTS BRANCH at 202-874-7640. For further assistance, contact FMS at 800-826-9434 or visit the official FMS Web site at [www.fms.treas.gov](http://www.fms.treas.gov).

