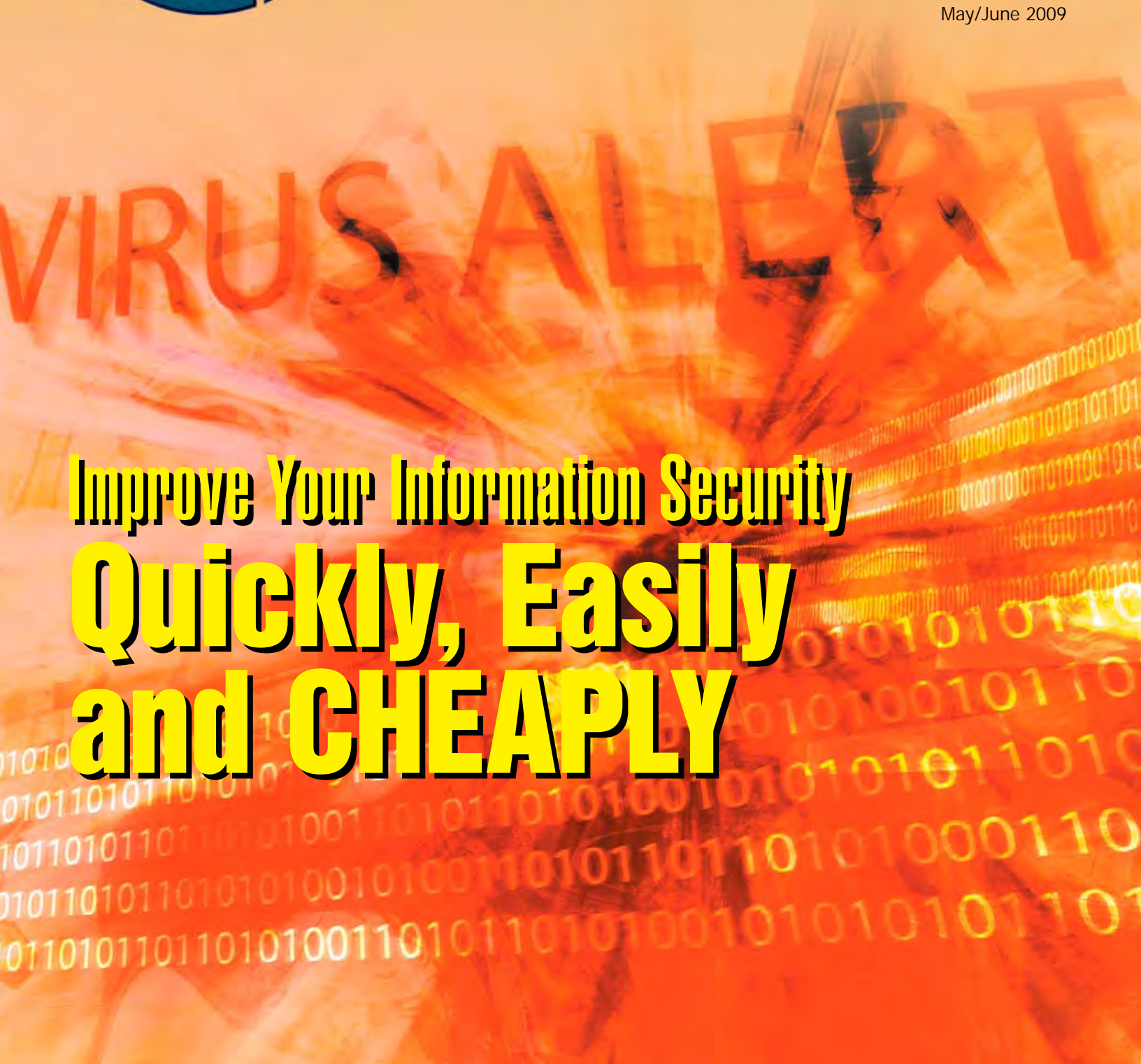




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OVER A CENTURY: BUILDING BETTER BANKS - HELPING COLORADANS REALIZE DREAMS

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FEATURE
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Government Receivables as Collateral?

Proceed With
Caution!

Current economic troubles have caused bankers to closely examine the quality of their borrowers' accounts receivable that secure asset based loans. As account

As part of the overall review of a borrower's accounts, if the borrower has receivables from the United States

18

Government, it is imperative that the banker ensure that the loan and loan documents comply with the Federal Assignment of Claims Act.

debtors delay paying invoices and the overall financial strength of account debtors weakens, borrowing base availability under a bank's typical commercial loan documents declines and the overall value of the bank's collateral diminishes. Bankers are routinely finding that foreclosing upon accounts in the current environment provides the bank with far less of a return than was originally contemplated.

As part of the overall review of a borrower's accounts, if the borrower has receivables from the United States Government, it is imperative that the banker ensure that the loan and loan documents comply with the Federal Assignment of Claims Act ("Act"). The Federal Assignment of Claims Act is often misunderstood. The Act, found at 41 U.S.C. § 15, applies to all obligations owing by the federal government or any agency or department of the federal government. It is supplemented by the Federal Acquisition Regulations ("FAR") found in Title 48 of the Code of Federal Regulations. The Act only governs notices of assignment and payment instructions. If the Bank does not comply with the Act, it may still have a valid assignment or security interest and prevail against junior security interests, judgment creditors and bankruptcy trustees. *However, if a bank does not comply with the Act and the government agency pays someone other than the bank, the bank has no claim against the government agency.*

The Framework

Prior to 1940, federal law prohibited the assignment of accounts receivable from contracts

with the federal government, which greatly diminished the value of such receivables as loan collateral. Although these anti-assignment laws were implemented to protect the government from the administrative burden of investigating the validity of each assignment and any corresponding claim, the laws effectively reduced the ability of private contractors that supply goods or services to the federal government to secure financing by granting lenders an interest in their accounts receivable. The Act, passed in 1940, addressed the impact of the anti-assignment laws by exempting certain assignments to "financing institutions." When financing government contractors, banks must proceed with care when navigating the extensive statutory and regulatory framework applicable to assignments of proceeds from contracts with the federal government.

The Act encourages lenders to finance government contractors by permitting the contractors to assign the right to payment from receivables as loan collateral. Despite the name of the Act (The Assignment of Claims Act), permissible assignments only capture the right to receive payments due under the contract rather than the contract itself or claims other than for payment arising under the contract. In short, if the bank complies with the Act, the government will pay contract payments directly to the bank.

Conditions and procedures for assignments under the Act are prescribed in FAR and are supplemented through regulations promulgated by federal agencies contracting

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With careful consideration of the risks and rewards, and diligent observation of the legal framework, lending against government receivables may provide lenders with a substantial source of business.

under the Act. Under those rules, an assignment of money due or to become due under a government contract as security for a loan is valid if:

- The contract specifies payment of at least \$1,000;
- The contract does not prohibit an assignment;
- The assignment is made to a bank, trust company or other financing institution (i.e., institution that deals in money as the primary function of its business activity);
- Unless otherwise expressly permitted in the contract, the assignment:
 - Covers all unpaid amounts payable under the contract;
 - Is not subject to further assignment;
 - Is made to one party, and such party participates directly in the financing, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

- Lender sends an original plus three copies of the notice of assignment and a true copy of the assignment instrument to (a) the administrative contracting officer performing all contract administrative functions, (b) any surety on bonds applicable to the contract, and (c) the disbursing officer authorized under the contract to make payments.

The administrative contracting officer is given a reasonable time after receipt of the notice of assignment to determine if the assignment is valid.

In addition to the foregoing, FAR requires that a lender be registered in the Central Contractor Registration database ("CCR"). CCR is used to collect, store and disseminate a variety of information for the Federal government and, for purposes of an assignment of money due under a government contract, facilitate paperless payment through electronic funds transfer.

■ **Proceed With Caution** | continued on page 20

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PROCEED WITH CAUTION – continued

There may be additional requirements applicable to assignments of amounts owing by certain federal departments or agencies. The provisions of the Code of Federal Regulations for the applicable department or agency should be reviewed in each instance.

The Risks and Rewards

Even after full compliance with the Act and FAR, lenders' collateral may be exposed to certain claims from sureties or the contractors' employees. Pursuant to the Miller Act, contractors must furnish certain payment and performance bonds for federal government contracts pertaining to the construction, alteration or repair of a public building or public work. A lender taking an assignment of proceeds from such contract is imputed with knowledge of the Miller Act's bond requirements. Any surety required to perform under a bond will have superior rights to proceeds from the underlying contract, regardless of an earlier assignment. Additionally, a lender's rights to assigned payments may be suspended if a contractor fails to comply with certain federal laws protecting employees, such as federal wage and hour statutes.

It should be noted that some courts have held that the Act requires that the bank must show that it loaned money or at least made money available for the performance of the government contract.

Regardless of the foregoing, financing government contractors may still be attractive to banks because of the continuous stream of timely payments available to pay down any outstanding balances. The federal government is subject to the Prompt Payment Act, which incentivizes the government to make payments when due by applying interest to late payments at a rate set by the Secretary of the Treasury. Additionally, with the federal government as the account debtor, lenders do not assume risk of non-payment due to insolvency as with non-government account debtors. Unless payments were made as a result of fraud, the federal government may not recover proceeds once paid to lenders.

How to Proceed

Register with CCR. To avoid additional delay, a lender should register in CCR (see www.ccr.gov) prior to sending its notice of assignment and a copy of the assignment instrument to the administrative contracting officer. After registering, the lender must update or renew its CCR registration once per year to maintain active status.

Thoroughly review government contracts. Government contracts must meet the conditions prescribed by the Act

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and FAR. Check to ensure that assignment is not prohibited by the contract. Additionally, the contracts should contain a “no-setoff” commitment to prevent the federal government from reducing assigned receivables to setoff the contractor’s indebtedness to the government.

Take care drafting assignment instruments. Assignment instruments must grant the lender ownership in the proceeds; a collateral assignment granting a security interest will be insufficient. Additionally, the assignment should only cover “moneys due or to become due” under the contract and should identify the contract by number. Blanket assignments capturing all assignable rights under the contract are not permitted under the Act and may be rejected by the administrative contracting officer.

Confirm appropriate form and delivery instructions for notices of assignment. Lenders must strictly comply with the notice requirements prescribed by FAR, including the form of the notice. Courts have consistently invalidated assignments for non-compliance with the notice requirements.

Perfect security interest in accounts receivable. Security interests must be perfected in accordance with the Uniform Commercial Code as is done when financing a non-government contractor. The Act does not apply to disputes between private parties (i.e., lenders and their borrowers) so compliance with

the Act does not perfect a security interest and vice-versa.

Ensure compliance with applicable state laws. This article summarizes federal laws regarding assignments of claims. If the contract is with a state agency or department, lenders must review and comply with any applicable state assignments of claims’ laws.

Although the foregoing article is not a comprehensive summary of the Act, lenders should be able to begin assessing whether credit facilities secured in whole or in part by government receivables are feasible and can be administered in a cost efficient manner. With careful consideration of the risks and rewards, and diligent observation of the legal framework, lending against government receivables may provide lenders with a substantial source of business. ■

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