

Less Isn't Always More: 1001(a)(1) Concealment Charges In Voluntary Disclosure Submissions

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In any investigation where a client is deposed or interviewed by a government agent, experienced lawyers should be wary of potential false statement liability under 18 U.S.C. §1001, and likely will have advised their clients of the paramount need to be truthful.

Voluntary communications, initiated by a company or individual, with government officials are of a different ilk, however, and practitioners in the past decade have taken guidance from *United States v. Safavian*, which stands for the proposition that it is not a crime to omit information when

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communicating with a government official, absent a legal duty to disclose those facts. However, a recent district court decision in the high-profile *United States v. Craig* case narrowed that holding, which may signal expanded liability when entities or individuals initiate communications with government agencies in the voluntary disclosure context.

In *Safavian* and *Craig*, the indictments accused the defendants of concealing or omitting material facts to a government official. In both cases, the defendants argued they lacked a legal duty to disclose the facts, significantly relying on the voluntary nature of their communications with the government. Yet, the courts arrived at starkly different conclusions, finding no legal duty to disclose in the *Safavian* matter, and finding a legal duty in *Craig*. The D.C. Circuit will not soon resolve directly any arguable difference here because *Craig* was acquitted but what does the district court's decision portend for companies submitting voluntary self-disclosures to U.S. agencies? Can the government now charge

them with violating 18 U.S.C. §1001(a)(1) for any purported omissions? In light of *Craig*, companies submitting voluntary disclosures would be prudent to avoid concealment allegations by closely examining their submissions for missing information that they are arguably legally bound to disclose.

**U.S. v. SAFAVIAN AND
U.S. v. CRAIG**

**False Statements
Liability Generally**

18 U.S.C. §1001 prohibits false statements to the government, which typically are affirmative misrepresentations in submissions to the government, or affirmative lies in the context of an investigatory interview. But 18 U.S.C. §1001 also prohibits concealing or omitting material facts. Specifically, 18 U.S.C. §1001(a)(1) states a person "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," commits an offense if he "knowingly and willfully falsifies, conceals, or covers up by any trick,

scheme, or device a material fact.” 18 U.S.C. §1001(a)(1).

United States v. Safavian

United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008), arose from the Jack Abramoff lobbying and corruption scandal. David Safavian, former chief of staff of the General Services Administration (GSA), was convicted of three counts of concealing material facts and making false statements in violation of 18 U.S.C. §1001(a)(1) and one count of obstructing justice in violation of 18 U.S.C. §1505 arising from investigations of a trip Safavian took with Abramoff in August 2002. While serving as the GSA’s chief of staff, Safavian shared information with Abramoff about two GSA-controlled properties that Abramoff expressed interest in for his children’s school and for one of his clients. While these discussions were ongoing, Abramoff invited Safavian to attend a five-day golf trip to Scotland on a private jet.

Shortly before the trip, Safavian requested an ethics opinion from the GSA’s general counsel about whether he could accept the airfare as a gift. In his request for advice, Safavian represented that “the host is a lawyer and lobbyist, but one that has no business before GSA (he does all of his work on Capitol Hill).” *Safavian*, 528 F.3d at 960. GSA’s general counsel provided an ethics opinion advising Safavian that he could accept the airfare as a gift. Subsequently, two government entities examined the

trip and, again, Safavian did not disclose Abramoff’s interest in the two GSA properties.

The D.C. Circuit reversed Safavian’s false statement convictions, finding with respect to his alleged concealment from the ethics officer that Safavian had no duty to disclose “all relevant information” because he was voluntarily seeking ethical advice — advice that he was under no duty to seek, nor under any duty to follow. The government’s references to standards of conduct for government employees did not establish a legal duty to disclose that information, which was essential to establish a concealment offense. *Id.* at 964. With respect to Safavian’s representations to the GSA agent, the Court again found no legal duty to disclose all relevant facts during that interview, pointing out that “[t]he government essentially asks us to hold that once an individual starts talking, he cannot stop.” The Court held: “We do not think 1001 demands that individuals choose between saying everything and saying nothing. No case stands for that proposition.” *Id.* at 965. Upon retrial, Safavian was convicted on other grounds. *United States v. Safavian*, 644 F. Supp. 2d 1 (D.D.C. 2009).

United States v. Craig

United States v. Craig, ___ F.Supp.3d ___, 2019 WL 3604630 (D.D.C. Aug. 6, 2019) narrowed the apparent breadth of *Safavian*’s holding. Gregory Craig, a

prominent Washington lawyer, was indicted on two counts of violating Section 1001 for statements he made to the National Security Division of the United States Department of Justice in 2013 related to his possible obligation to register under the Foreign Agents Registration Act (FARA). Craig and his law firm were engaged by the Ukrainian government to prepare a report regarding the fairness of the 2011 trial of former Ukrainian Prime Minister Yulia Tymoshenko. The indictment asserted that Craig concealed the extent of his involvement in the subsequent public relations effort to promote the findings of his report.

Shortly after the report was publicly released, the DOJ FARA Unit inquired about whether the firm was engaged in activities that may trigger FARA’s registration requirement and requested specific categories of information to assist the unit in making that determination. Craig responded via letter, denying that his law firm had provided any services covered under FARA but omitting any reference to Craig’s contacts with the U.S. media or his involvement in a PR firm’s media plan. *Id.* at 6. When the FARA Unit concluded that Craig and his law firm should register as foreign agents, Craig resisted the registration in-person and then in writing, again omitting involvement in the public relations strategy. *Id.* at 9.

On Craig's motion to dismiss, the district court rejected his argument that he had no legal duty to disclose the omitted facts. (The District Court dismissed the FARA-specific false statements count based on the rule of lenity.) The court determined that a legal duty arose because FARA is a *disclosure* statute that requires individuals who are engaged in certain activities in the interest of foreign entities ("foreign agents") to disclose those activities. *Id.* at 2, 15.

The district court distinguished Craig's case from *Safavian*, pointing out that Craig's disclosure obligations were articulated within the statute and explicitly stated in the FARA registration form. Once Craig engaged with the FARA Unit, the questions from the FARA Unit laid out what it needed to know and Craig was bound to be truthful and not omit material facts. *Id.* at 2, 12. The district court reasoned that the indictment also included allegations of affirmative false statements and the omissions were part of an overall scheme to conceal information, further distinguishing it from *Safavian* and alleging more than a passive failure to disclose. *Craig* at 19. Craig was thereafter acquitted at trial.

**CONCEALMENT
LIABILITY IN THE
VOLUNTARY DISCLOSURE
CONTEXT**

These precedents have many significant implications in the

context of a company seeking to utilize a government agency's voluntary disclosure regime and gain credit from voluntarily raising potential misconduct. Based on *Safavian*, the voluntary nature of self-disclosure regimes mean that, presumably, companies participating in these programs would enjoy discretion as to which facts they include in their submissions — notwithstanding that omissions also potentially dilute the value of such submissions. The company could decide when to stop talking, as there would be no obligation to disclose everything once it started speaking. However, the decision in *Craig* bespeaks caution, making it clear that some statutes or government forms — in this case the disclosure provisions of FARA and its registration form — could be seen as imposing a legal duty to disclose. In those cases, the discretion as to what must be included in a voluntary disclosure is not up to the drafter, and false statement liability could arise from what is omitted.

The district court in *Craig* noted that Craig's argument that he lacked a legal duty to disclose was "blurring the critical distinction between the underlying statutory duty to disclose certain facts and a hypothetical duty, not alleged to have been violated here, to volunteer information to an unsuspecting agency or to respond to polite

requests for information instead of remaining silent as he has the right to do." *Id.* at 17. Thus, *Craig* appears to accept, consistent with *Safavian*, that certain voluntary disclosures will not trigger a legal duty to disclose all relevant facts. Further, *Craig* is a single district court's analysis of this issue. Nonetheless, given the volume of such submissions to agencies based in Washington, practitioners would be wise to proceed with caution when advising clients regarding how fulsome they should be in making voluntary disclosures, as *Craig* teaches that a legal duty to disclose information may arise even in the voluntary disclosure context from statutory language, forms, or even informal or follow-up questioning from officials who otherwise lack formal investigatory authority.

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