

## Proposal for Omissions as Borrower Defense to Repayment

### §668.75 Omission of fact

An omission of fact includes the concealment, suppression, or absence of relevant information or statements, in connection with the nature of the institution's educational programs, financial charges, or the employability of the institution's graduates that has the capacity or tendency or effect of deceiving students or prospective students in any material respect. An omission of fact includes, but is not limited to, the knowing concealment, suppression, or absence of relevant information or statement concerning—

(a) The entity that is actually providing the educational instruction;

(b) The availability of slots, or requirements for obtaining admission, in a program where the institution places students in a pre-program at the time of enrollment;

(c) Factors that would prevent a prospective student, for reasons such as prior criminal records or preexisting medical conditions, from qualifying to meet requirements that are generally needed to be employed in the field for which the training is provided;

(d) Whether the program the prospective student is enrolling in meets state licensure requirements to be employed in the field for which the training is provided in the state the prospective student resides in; and

(e) An eligible institution's failure to disclose that the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has not been authorized by the appropriate State educational agency, or requires specialized accreditation; or,

(f) The nature of the institution's educational programs, the institution's financial charges, or the employability of the institution's graduates.

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**Commented [A1]:** There is a significant body of caselaw in Massachusetts that determines whether an omission is deceptive:

"Advertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A." *Aspinall v. Phillip Morris Cos.*, 442 Mass. 381, 394 (2004). "The criticized advertising may consist of a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Id.* at 395; *Underwood v. Risman*, 414 Mass. 96, 99-100 (1993) ("A duty exists under c. 93A to disclose material facts known to a party at the time of a transaction."). In essence, "an advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted" (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall*, 442 Mass. at 396. Notably, "a successful G.L. c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false." *Aspinall*, 442 Mass. at 394 (citations omitted).

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**Commented [A2]:** These changes are drawn from Massachusetts's UDAP law. See 940 CMR 3.05 promulgated under M.G.L. c. 93A.

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