

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

NANCY ENGLISH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2013-2773
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On November 22, 2013, the presiding officer submitted her Recommended Order to the State Board of Administration (“SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Nancy English, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. The Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions, which were due on December 7, 2013. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

**STATEMENT OF THE ISSUE**

The Statement of the Issue as set forth in the presiding officer’s Recommended Order hereby is adopted in its entirety.

## FINDINGS OF FACT

The Findings of Fact set forth in paragraph 1 of the presiding officer's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 2 the Recommended Order hereby are modified to read as follows:

2. On July 12, 2012, Petitioner and her husband, Mr. English, made to a telephone call to the MyFRS Financial Guidance Line ("Guidance Line") [R-2]. During this call, Mr. English inquired about investment options and was told that the DROP funds could be moved to a qualified plan outside the FRS or could be placed in one or more of the 20 investment options, all mutual funds, offered by the FRS Investment Plan. He asked specifically if there were any guaranteed return funds, and was advised repeatedly, and apparently understood, that none of the funds came with a guarantee. He further was informed that the money market fund would be the safest available option. Further, Mr. English was aware, even before Petitioner transferred any of her DROP funds, that the FRS only offered mutual funds. During this telephone call, the following exchanges occurred between Mr. English, and the Ernst & Young ("E&Y") representative staffing the Guidance Line on behalf of the SBA:

MR. ENGLISH: ... I mean, there's no, there's no safe investment that the FRS has that is available?

E & Y REPRESENTATIVE: Right, there's no guaranteed investment.

MR. ENGLISH: Right. Right.

E & Y REPRESENTATIVE: I mean, if you wanted to go safe, yeah, we can go with the money market, but there's no such thing as a guaranteed investment there.

MR. ENGLISH: Okay. That was my question because I, you know, I can get a guaranteed investment elsewhere you know. That was my whole question. ...  
[R-2, p. 9, lines 3-14].

Later in the call, the following exchange occurred:

MR. ENGLISH: ... And I don't want to invest in the stock market. I want to, I want to invest in something that's a guaranteed rate of return, and I'm trying to find something like that.

E & Y REPRESENTATIVE: Right.

MR. ENGLISH: That's why I called you, to see if you all had it. Obviously, you don't so...  
[R-2, p. 16, lines 21-25; p. 17, lines 1-3].

At the end of the call, the following exchange occurred:

E & Y REPRESENTATIVE: As I mentioned, these are all in the stock market and I'm-- it's not going to be able to guarantee you, so we're not--.

MR. ENGLISH: And FRS has mutual funds invested-- they have nothing but mutual funds?

E & Y REPRESENTATIVE: Right. Exactly.

MR. ENGLISH: Yeah. And I'm not even-- and I wouldn't be interested in that for no amount of money, so --- okay. Thank you very much.  
[R-2, p. 21, lines 4-12].

The Findings of Fact set forth in paragraphs 3 through 6 of the Recommended Order hereby are adopted in their entirety.

The Findings of Fact in paragraph 7 of the Recommended Order are revised as follows:

7. The October 2012 FRS Investment Plan Quarterly Newsletter expressly advised, “Before you select any investment fund or make an election, you should review the Fund Profiles, the Investment Fund Summary, and the Annual Fee Disclosure Statement posted in the ‘Investment Funds’ section at *MyFRS.com*,” and “If you exercise control over the assets in your Investment Plan account, . . . pursuant to Section 404(c) regulations and all applicable laws governing the operation of the Investment Plan, no program fiduciary shall be liable for any loss to your account which results from your exercise of control.” The October 2012 FRS Investment Plan Quarterly Newsletter further noted that performance information for the various funds set forth therein represented “past performance” for those funds, and that “[p]ast performance is not necessarily an indication of future performance.” [R-3, p. 4, footnote 1]. The Annual Fee Disclosure Statement also advised that:

“ . . . past performance does not guarantee how the investment fund will perform in the future. Your investment in these funds can lose money.” Information about a fund’s investment objectives, strategy and principal risks is available on *MyFRS.com*.  
[R-11, p. 3]

The Findings of Fact set forth in paragraph 8 of the Recommended Order hereby are adopted in their entirety.

The Findings of Fact in paragraph 9 of the presiding officer’s Recommended Order hereby are modified to read as follows:

9. On January 8, 2013, shortly after Petitioner’s account assets were moved to the TIPS fund, Petitioner and her husband called the MyFRS Financial Guidance Line (“Guidance Line”), stated the reason why they had invested in TIPS, and asked various questions about the TIPS fund, how it worked and how they could anticipate returns and

minimize risk. At the beginning of the call, the following exchanges occurred between Petitioner's husband, Mr. English, and the Ernst & Young ("E&Y") representative staffing the Guidance Line on behalf of the SBA:

E & Y REPRESENTATIVE: Now, your wife said you had a couple of questions. I'll do my best to answer them.

MR. ENGLISH: Just a general – couple of general questions. I was looking at all the stock options that were available and, of course, the TIPS is the one that stood out. It has earned more in over the last ten years, been more steady than any of them, so we put everything in that. What makes that go up and down? (R-4, p. 5, lines 1-10).

The representative went on to discuss that inflation would cause an increase in value and deflation would cause a decrease in value. That is, the principal would decrease in value and the fixed interest rate would be applied to the decreasing principal, thereby causing a loss in the value of the investment. R-4, p. 5, lines 1-25; p. 6, lines 1-25; p. 7, lines 1-4; 11-25; p. 8, lines 1-9 ). Further into the call the following exchanges occurred:

MR. ENGLISH: Okay. And I looked at the TIPS, the one I'm in now, and it shows on this paper that I've got that it returned 11.66 percent.

E & Y REPRESENTATIVE: One moment sir. Let's take a look at it.

MR. ENGLISH: Does that sound right to you? That was for last year.

E & Y REPRESENTATIVE: No, sir. It returned about 7.85 percent for the year.

MR. ENGLISH: Okay. Well, see, this paper, this FRS paper that they just sent me that I went by – that I'm going by, it shows you, it shows you the average—it shows you the historical performance. It says for one year, 11 point—let's go with the top number, 11.80; for five-year, 8.57; for 10-year, 7.24. Is that the same numbers you have? [R-4, p. 9, lines 3-20].

When the E& Y representative noted that he had different figures for the returns, Mr. English asked for an explanation of the discrepancies. Mr. English noted the document he was reviewing was the Annual Fee Disclosure Statement of the FRS Investment Plan and that the figures set forth therein were as of June 30, 2012. (R-4, p. 10, lines 15-20, p. 12, lines 1-15; p. 15, lines 9-21). During this January 8, 2013 conversation, Mr. English stated in response to the E&Y representative's inquiry as to when his wife rolled the money into the TIPS that the rollover occurred "a couple weeks ago" and that "...this piece of paper..." [The Annual Fee Disclosure Statement of the FRS Investment Plan which set forth the historical performance of the TIPS] was "...the reason I did [the rollover]." R-4, p. 11, lines 19-25; p. 12, lines 1-15). The E & Y representative stated he was working with figures as of November 30, 2012. Once Mr. English was satisfied that any discrepancies were due to the timing differences of the information, the following exchange occurred at the end of the conversation:

MR. ENGLISH: All right. Well-okay. I, I guess my main question is that- I put it in the TIPS because that appeared to be the best fund that was going out of all of them that I've looked at, and I just want to know that, that I'm not in line for it to start losing money any time soon or if it looks like it's, it's going to be stable- a stable fund..

E & Y REPRESENTATIVE: Well, yes sir, it is fairly stable because it does have a fixed interest rate that's around two to three percent.

MR. ENGLISH: Okay.

E & Y REPRESENTATIVE: And that basically – because some of it is protected, which is the inflation protected security. So if inflation does go up and the dollar starts to lose value, you- you're- basically your investment or the principal you invested, will go up with inflation, so you're protected against that. [R-4, p. 17, lines 15-25; p. 18, lines 1-8].

At no point during this fairly lengthy and rather detailed exchange did Mr. English make any reference to the statements in the October 2012 FRS Investment Plan Quarterly Newsletter (“October 2012 Newsletter”) and its overview of the TIPS fund which discussed the fixed interest rate of between 1% to 4% and the return of principal, or indicate that he believed the October 2012 Newsletter contradicted previous statements he had been given on the MyFRS Financial Guidance Line. At this point in time, Petitioner’s TIPS account had begun to lose value. Further, Mr. English never asked during the conversation how the rates of return on the TIPS that he read in the Annual Fee Disclosure Statement, which went up to 11.80 percent, were calculated. Nor did he question why the rates of return for the TIPS fund set forth in the Annual Fee Disclosure Statement were different (higher than) than those returns set forth in the October 2012 Newsletter. (R-3, p. 3; R-11, p. 4). He did note that the Annual Fee Disclosure Statement was the reason he and his wife transferred the DROP funds into the TIPS.

Mr. English had been advised during the July 12, 2012 telephone call to the MyFRS Financial Guidance Line that he would be able to obtain the most recent rates of return on all of the available investment options, as well as their historical performance, by going to the MyFRS.com website. He indicated he did have access to a computer. [R-2, p. 7, lines 2-25; p. 8, line 1].

The Findings of Fact set forth in paragraphs 10 through 14 of the presiding officer’s Recommended Order hereby are adopted in their entirety.

## CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraph 15 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

Paragraphs numbers 16 through 18 of the Conclusions of Law are rejected. This Final Order substitutes and adopts the following Conclusions of Law:

16. Generally, the party asserting the affirmance of a factual issue has the burden of proof in an administrative proceeding. *See, e.g., Balino v. Dept. of Health & Rehabilitative Services*, 348 So.2d 349 (Fla. 1<sup>st</sup> DCA 1977). As such, as was noted during the hearing, the Petitioner has the burden of proof in this proceeding. [Hearing transcript, p. 5, lines 21-23]. The usual standard of proof for questions of fact in an administrative proceeding is a preponderance of the evidence. *See, e.g., Haines v. Department of Children & Families*, 983 So.2d 602 (Fla. 5<sup>th</sup> DCA 2008).

17. Petitioner asserts that the description of the TIPS fund contained in the October 2012 Newsletter was false or misleading. She further claims that the SBA should be held liable for the losses she experienced. It is unclear what legal authority Petitioner is utilizing to support her argument that liability should be imposed on the SBA. Petitioner has supplied two articles discussing false and misleading advertising- one giving an overview of the Federal Lanham Act, and the second from a law firm providing a brief outline of the subject. (See, P-2 and P-5). Thus, it may be the case that Petitioner is asserting that the October 2012 Newsletter was an advertising piece designed to induce her to invest in the TIPS fund rather than in one of the other almost 20 funds made available by the FRS Investment Plan or into some other qualified plan. However, she has set forth no arguments to support any assertion



that the October 12, 2012 Newsletter would fit a legal definition of “advertising” let alone actionable “misleading advertising.” Further, Petitioner’s own exhibit containing the article on the Lanham Act specifically states that “[c]ourts have consistently rejected consumer standing to sue for false advertising under the Lanham Act.” P-2, p. 6].

18. While Petitioner’s husband testified during the hearing that they based their decision to divert the Petitioner’s DROP funds from the money market fund into the TIPS fund solely based on statements contained in the October 2012 Newsletter, this directly contradicts statements Petitioner’s husband made to the E & Y representative during a January 8, 2013 phone call made shortly after the Petitioner’s DROP account was transferred from the money market fund into the TIPS fund. During that phone call Petitioner’s husband clearly stated that the TIPS fund appeared to provide the greatest return and the most stability based on information he had read in the Annual Disclosure Statement for the FRS Investment Plan which set forth historical returns of the various FRS Investment Plan investments as of June 30, 2012. A review of this Annual Disclosure Statement shows that these returns for the TIPS fund, which ranged from 7.24 for the 10 year return to 11.80 for the 6-month return did significantly exceed the returns of the numerous other investments offered by the FRS Investment Plan. [Exhibit R- 11, pp. 4-7]. If Petitioner and her husband had indeed based their decision to invest in the TIPS fund on what they are asserting were “misleading” statements in the October 2012 Newsletter,” it would seem that the October 2012 Newsletter would have been a hot topic of conversation during their January 8, 2013 conversation with the MyFRS Financial Guidance Line, especially in view of the fact that Petitioner’s TIPS account was starting to decrease in value at this point. It would seem they would be questioning why the TIPS account was not performing in a manner consistent with what they

have asserted the statements contained in the October 2012 Newsletter meant to them. However, the subject of the October 2012 Newsletter was never broached during the conversation.

19. Based on the record evidence, it is clear that Petitioner did not base her decision to invest in the TIPS fund due to statements giving a synopsis of the TIPS fund contained in the October 2012 Newsletter, but rather on rates of return for the TIPS fund set forth in the Annual Fee Disclosure Statement. At no point in any telephone calls that Petitioner and/or her husband made to the MyFRS Financial Guidance line or during the hearing did Petitioner assert that the rates of return in the Annual Fee Disclosure Statement were misleading. Petitioner may have believed that similar rates of return would continue, but both the October 2012 Newsletter and the Annual Fee Disclosure Statement specifically state that past performance is not necessarily an indication of how a fund will perform in the future. [R-3, p. 4, footnote 1; R-11, p. 3].

20. Petitioner opted to transfer funds from her money market account to the TIPS fund based on an anticipated rate of return that seemed to be higher than that realized by other available funds. This decision was based on accurate historical information. And the materials Petitioner used in deciding to transfer specifically warned that the historical rates of return could not be used to predict future performance. Petitioner further was repeatedly warned that no available fund had a guaranteed rate of return. Despite these warnings, Petitioner decided to take the risk that the more favorable rates of return from the TIPS fund would continue into the future. Petitioner also opted to transfer funds out of the TIPS fund after having been invested in the TIPS fund for only a period of about five (5) months, rather than waiting to see if the rates of return might rebound at some point in the future. As such,

Petitioner can be said to have exercised control over the assets in her account. Pursuant to Section 121.4501(15)(b), Florida Statutes, when such control is exercised, the SBA and any of its providers are not liable to any losses incurred by an FRS Investment Plan member or beneficiary.

21. Respondent lacks the authority to depart from the requirements of Chapter 121, Florida Statutes, when exercising its jurisdiction. *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla. Div. Admin. Hrgs). Nowhere in Chapter 121 is the SBA granted authority to enter an award of money damages (if indicated) for any investment losses. When an issue involves a cause of action in which damages are sought, a court, not an administrative body, has jurisdiction. *See, e.g., Mobile America Corp. v. Southern Bell Telephone & Telegraph Co.*, 282 So.2d 181 (Fla. 1<sup>st</sup> DCA 1973), *modified* 291 So.2d 199 (Fla. 1974).

While unfortunate that Petitioner has suffered a loss on an investment she made, Petitioner has not met the burden of proof of showing that she is entitled to any relief from the SBA.

**ORDERED**

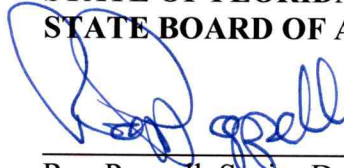
The Petitioner's request that she be reimbursed for losses incurred by her Florida Retirement System Investment Plan account balance due to the investment of Petitioner's Deferred Retirement Option Program (DROP) funds from the FRS Select Money Market Fund to the FRS Select U.S Treasury Protected Securities Index Fund hereby is denied.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of

Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 4<sup>th</sup> day of February, 2014, in Tallahassee, Florida.

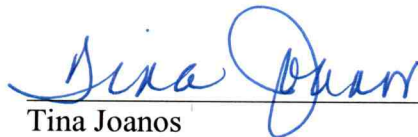
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

FILED ON THIS DATE PURSUANT TO  
SECTION 120.52, FLORIDA STATUTES  
WITH THE DESIGNATED CLERK OF THE  
STATE BOARD OF ADMINISTRATION,  
RECEIPT OF WHICH IS HEREBY  
ACKNOWLEDGED.

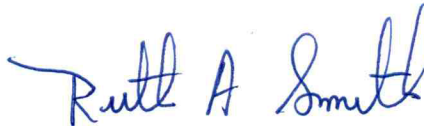


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Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by U.S. Mail to Nancy English, pro se, [REDACTED] and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 4th day of February, 2014.



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Ruth A. Smith  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

NANCY ENGLISH,

Petitioner,

v.

CASE NO. 2013-2773

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on August 22, 2013, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Nancy English, pro se

  
Petitioner

For Respondent: Brandice D. Dickson, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner is entitled to reimbursement of losses to her Florida Retirement System (FRS) account balance due to her investment of her Deferred Retirement Option Program (DROP) funds in the Select U.S. Treasury Protected Securities Index Fund

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offered as part of the FRS Investment Plan. She asserts that her purchase of this fund was based on false or misleading information promulgated by the SBA in its newsletter.

### **PRELIMINARY STATEMENT**

Petitioner attended the hearing in person with her husband, Steve English, who testified on her behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, and Andrew Clarke, Financial Planner with Ernst & Young, a third party provider to the SBA Investment Plan. Petitioner's Exhibits 1-5 and Respondent's Exhibits 1 through 11 were admitted into evidence at the hearing without objection. At the hearing, I requested that all recorded calls made by Petitioner be transcribed and entered into the record. These calls are now in the record as Exhibits R-12 through R-16.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

### **MATERIAL UNDISPUTED FACTS**

1. Petitioner is a former employee of the Martin County Tax Collector and a member of the FRS who was enrolled in the Deferred Retirement Option Program. On a July 12, 2012 call, Petitioner gave permission for her husband, Steve English, to speak on her behalf with a MyFRS Financial Guidance Line representative regarding her upcoming DROP termination date and where to place her DROP accumulation funds.

2. Mr. English inquired about investment options, was told that the money could be moved out of the FRS to any other qualified plan and about the 20 different investment options,

all mutual funds, offered by the FRS Investment Plan. He asked specifically if there were any guaranteed return funds and was told there were not, but that the money market fund would be the safest.

3. Petitioner had not yet, at the time of the July, 2012 call, received her DROP termination kit, but she and her husband were doing early research to decide what to do with the lump sum she would receive. They were told that the MyFRS website contained specific information on all 20 available funds.

4. During that call, Petitioner's husband was advised repeatedly that if Petitioner's DROP Accumulation were rolled over into the FRS Investment Plan, there was no investment option available that would result in a guaranteed return.

5. On August 21, 2012, Petitioner filed a DROP Accumulation Direct Rollover Form for Current DROP Members requesting that 100% of her DROP Accumulation be placed in the FRS Select Yield Plus Money Market Active Fund. This is the fund which had been described to Petitioner as the safest option for those who wanted minimal risk.

6. The October, 2012 FRS Investment Plan Quarterly Newsletter, made available to Petitioner, gave an overview of the different types of asset classes available to Investment Plan members and included this description:

**Inflation-Protected Securities Funds**

These funds invest in United States Treasury inflation-protected securities (TIPS).

TIPS provide two types of return. First, there's a fixed interest rate that's been around 1% to 4% since TIPS were first issued in 1997. Second, there's a return of principal (the starting amount of your investment) and interest (the additional



earnings you get over time) that is “protected,” or indexed to inflation. As inflation rises, so does the amount of principal and interest you receive. So, if the fixed rate is 3% and inflation is 3%, you receive a total interest rate of about 6%. The day-to-day value of inflation-protected securities varies with changes in inflation and interest rates, but these funds offer a promise of keeping up with inflation, which is unique to this type of investment.

The Newsletter listed the FRS Select U.S. Treasury Protected Securities Index Fund as the only offering in the Inflation Protected Securities Funds category. In December 2012, Petitioner moved all her DROP assets from the money market fund to the TIPS fund.

7. The October 2012 Quarterly Newsletter expressly advised, “Before you select any investment funds or make an election, you should also review the Fund Profiles, the Investment Fund Summary, and the Annual Fee Disclosure Statement posted in the ‘Investment Funds’ section at *MyFRS.com*,” and “If you exercise control over the assets in your Investment Plan account, . . . pursuant to Section 404(c) regulations and all applicable laws governing the operation of the Investment Plan, no program fiduciary shall be liable for any loss to your account which results from your exercise of control.”

8. The TIPS fund Lipper profile contained the following description:

**Inflation Protected Bond Funds**

Funds that invest primarily in inflation-indexed fixed income securities issued in the United States. Inflation-indexed bonds are fixed income securities that are structured to provide protection against inflation.

9. On January 8, 2013, shortly after Petitioner's account assets were moved to the TIPS fund, Petitioner and her husband called the MyFRS Financial Guidance Line and asked numerous questions about the TIPS fund, how it worked and how they could anticipate returns and minimize risk. At the conclusion of the call, this exchange occurred:

MR. ENGLISH: All right. Well – okay. I, I guess my main question is that – I put it in the TIPS because that appeared to be the best fund that was going out of all of them that I've looked at, and I just want to know that, that I'm not in line for it to start losing money any time soon or if it looks like it's, it's going to be stable – a stable fund.

E & Y REPRESENTATIVE: Well, yes, sir, it is fairly stable because it does have a fixed interest rate that's around two to three percent.

MR. ENGLISH: Okay.

E & Y REPRESENTATIVE: And that basically – because some of it is protected, which is the inflation protected security. So if inflation does go up and the dollar starts to lose value, you – you're – basically, your investment or the principal you invested, will go up with inflation, so you're protected against that.

10. After Petitioner moved her account assets to the TIPS fund, she suffered a loss. When her account was down by about \$ [REDACTED] Petitioner filed a Request for Intervention and a Petition for Hearing seeking to be reimbursed for the loss incurred in her account, alleging she was misled by the October 2012 Quarterly Newsletter and the MyFRS Financial Guidance Line. Petitioner was invested in the TIPS fund from December 20, 2012 through May 30, 2013.

11. In his response of June 17, 2013 denying Petitioner's Request for Intervention, Mr. Beard wrote:

In regards to the FRS Select TIPS Fund, it invests in United States Treasury inflation-protected securities (TIPS) or bonds. As explained in the Investment Plan Quarterly Newsletter, TIPS bonds issued by the US Treasury pay a coupon on the adjusted principal of the individual bond. The bond is adjusted on a semi-annual basis with the rate of the Consumer Price Index (a measure of inflation). TIPS are said to keep pace with inflation by returning the adjusted principal upon maturity of the bond and coupon payments along the way.

The FRS Select TIPS Fund holds TIP securities in a commingled trust (an institutional counterpart to a retail mutual fund). Participants or shareholders in the trust have shares of the trust as a whole, not of each security held. The managers of that trust/fund may or may not hold an individual TIP security until maturity. In the short-term, TIPS funds may be volatile. TIPS are priced on a daily basis based on expectations of future inflation rates (and the value is also affected by changes in interest rates). A commingled trust or mutual fund holding TIPS securities does not mature. There is not a guarantee that when a participant withdraws their money, that they will receive the full amount of their investment (see the Fund Profiles).

12. At the hearing, Petitioner's husband acknowledged that he had been told that the Investment Plan did not offer a fixed return investment fund. He asserted, however, that the October, 2012 Quarterly Newsletter made it appear that the TIPS fund *was* a fixed investment fund because the description included the term "fixed interest rate" to describe one of the variables that determined the rate of return. Mr. English testified that Petitioner selected the TIPS fund because the Newsletter description led him to believe it was the closest fund the FRS had to a fixed investment fund, and that he could follow its likely return by following the inflation rate, through any publicly-available index. During the hearing, the following exchange was had:

MS. DICKSON: Okay. Could you point out to us what you believe is – comprises the discrepancy?

MR. ENGLISH: Yeah. It says these funds will be invested in United States

Treasury Inflation Protected Securities, TIPS. TIPS provides two types of return. First, there's a fixed interest rate that's been between 1 and 4 percent since TIPS was first issued. So there's this fixed rate right there. He said they don't have anything with a fixed rate, but this says you do.

So I took that as it's not a – you can still incur a loss with this fixed interest rate because it's a variable fixed rate. You can incur a loss the way it's set up because the rate obviously could go down below 1 percent or minus 2 percent or something, and you could incur a loss. Or it could go up. That was my understanding of it.

That's why – once again, that's why we invested in it, because this was the closest thing to a fixed rate that they had to offer. So that's why we chose it.

MS. DICKSON: Okay. And is it my – is it your understanding that the information that was provided to you on page 2 of the October 2012 quarterly newsletter that is Exhibit P-1 to these proceedings, that that paragraph under inflation protected securities funds advised you that you could suffer a loss if you invested in that particular fund?

MR. ENGLISH: This doesn't say that, no. But even with reading it, I realized it was possible, if – if things in this – fell into place in the manner that was allowed. It was possible. If – if, using this, if the interest rate when below zero and the inflation rate went below zero, yes, you could incur a loss. That was my understanding.

13. Petitioner made a number of other calls to the MyFRS Financial Guidance Line after it became clear that her account was rapidly losing value. Her husband repeatedly tried to square his understanding of how the TIPS fund worked, based on the Newsletter description and what he had been told previously, with its falling value. In particular, based on the Newsletter example that stated, "So, if the fixed rate is 3% and inflation is 3%, you receive a total interest rate of about 6%," he inferred that the "fixed rate" could not go down and, although the inflation

rate could vary, the approximate return could be calculated by simply adding these two numbers. He also knew that the rate of inflation in the applicable period had not been negative, but, as confirmed by the Ernst & Young representative on the MyFRS Guidance Line, had hovered at about one percent, which by his calculation meant that the fund return could not be negative. The representative eventually confirmed that there was actually no fixed interest rate, and that the TIPS fund was a type of mutual fund subject to a full range of market forces. In successive calls to the Guidance Line, the explanations of different representatives as to how the fund really works became clearer with each call. And Mr. Beard's letter of June 17, 2013, quoted above, is a full, comprehensible and accurate statement, including the critical information that TIPS funds can be volatile and are priced on a daily basis with value based on expectations of future inflation and changes in interest rates.

14. Petitioner could have taken her money out of the TIPS fund at any time, but the majority of her loss occurred by early January, 2013, when her account was down by about [REDACTED]. Her husband had been told by a MyFRS counselor to expect some fluctuations, but implied they would be minor:

[I]f we're looking over the short-term, there will be some fluctuations; right? Not as much as the overall stock market; right? Because these are bonds; right?

(R-8, p. 4, l. 21-24.) After concluding that she had been misled, Petitioner was reluctant to switch the account back to the money market fund, believing that she would thereby compromise her claim (R-12, p. 2, l. 18-22.)

#### CONCLUSIONS OF LAW

15. There is no evidence that any employee or agent of Respondent told Petitioner

that there was a guarantee that she would not suffer a loss in her investment in the FRS TIPS Fund, and Section 121.4501 (15)(b), Florida Statutes states:

**(15) Statement of fiduciary standards and responsibilities.--**

(b) If a member or beneficiary of the investment plan exercises control over the assets in his or her account, as determined by reference to regulations of the United States Department of Labor under s. 404(c) of the Employee Retirement Income Security Act of 1974 and all applicable laws governing the operation of the program, a program fiduciary is not liable for any loss to a member's or beneficiary's account which results from the member's or beneficiary's exercise of control.

§121.4501(15), Fla.Stat. (2012). The purpose of this proceeding under the Administrative Procedure Act is to determine whether the SBA's announced intended agency action should become final agency action, not to recover damages for past conduct. See Woodring v. Department of Labor and Employment, 1989 WL 645133 (Fla. Div. Admin. Hrgs. Case No. 88-5970). Stated differently, in accord with the statute it implements, the SBA, "shall receive and resolve member complaints against the program, . . . or any program vendor or provider . . . and may resolve any other conflicts." Section 121.4501(8)(g), Florida Statutes (2012). (Emphasis added.) Per Rule 19-11.001(9), a complaint, "shall mean a member's written or verbal expression of dissatisfaction with an FRS Investment Plan provider or one of its representatives. Investment Plan providers include all the third parties providing services as well as the FRS Investment Plan Administrator. Rule 19-11.001(26)(a-e) F.A.C.

16. In this case, the Petitioner asserts that the description of the TIPS fund contained in the October 2012 Newsletter was false or misleading. After reading this description carefully, I concur with her assertion. Respondent asserts that various words and phrases elsewhere in that

Newsletter, as well as resources available on the website, clarify and qualify the Newsletter description. But having consulted these resources, I cannot find that they adequately ameliorate the false impression contained in the description, particularly the implication that the rate of return consists simply of the “fixed rate” plus the rate of inflation. In addition, no matter how much qualifying material is available, a brief summary description still should not be misleading, especially as Respondent is directed that all educational materials are to assume an unsophisticated investor. Investment Plan Investment Policy Statement, VIII B., Rule 19-9.001, F.A.C.; § 121.4501(11), Fla. Stat. And the SBA is to ensure that such information, tailored specifically for unsophisticated investors, is provided to Investment Plan members on a quarterly basis. § 121.4501(11); Rule 19-13.001(1)(e), F.A.C.

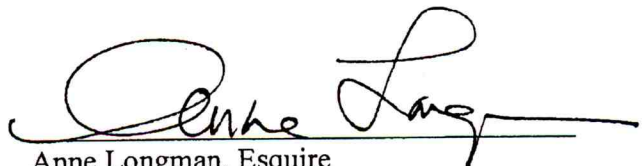
17. The SBA has now taken action to change and clarify the TIPS fund description used in the quarterly newsletters, but this does not provide any resolution of the complaint of this Petitioner. A member cannot exercise control over the assets in her account, as contemplated by Section 121.4501(15)(b), if information provided is false or misleading, even if, as here, it is clear that Respondent had no intent to mislead. If the communication to members is not clear, particularly with regard to an asset class which is apparently difficult even for a financial counselor to adequately and accurately explain, the member’s ability to effectively independently manage and exercise control over her assets has been compromised. I conclude that but for the inaccurate communications to Petitioner by Respondent and/or its third party providers, Petitioner would not have invested in the TIPS funds offered by the Investment Plan, and that it is the statutory responsibility and duty of Respondent to resolve Petitioner’s complaint arising from this error. Section 121.4501(8)(g), Fla. Stat.

18. An administrative agency has no plenary jurisdiction to award damages, but when a statute other than the Florida Administrative Procedure Act requires an agency to provide remedies – i.e. “shall resolve member complaints” against the program, § 121.4501(8)(g), that statute must be heeded. See e.g., Williams v. Sailorman, 2003 WL 21978284 (Fla. Div. Admin. Hrgs. Case No. 02-3995) (noting distinction between compensatory and punitive damages, not available in an administrative proceeding, and the award of back pay in such a proceeding, as authorized by a separate statute; Woodring recognizes this same distinction.) It appears that resolution of this case would require an accounting to return Petitioner’s investments to the status quo ante, but while I conclude that the instant complaint should be resolved in Petitioner’s favor, I make no specific recommendation as to the most appropriate way for Respondent to do this.

### RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order resolving Petitioner’s member complaint in her favor.

RESPECTFULLY SUBMITTED this 22<sup>d</sup> day of November, 2013.



Anne Longman, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
315 South Calhoun Street, Suite 830  
Tallahassee, FL 32301-1872



NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

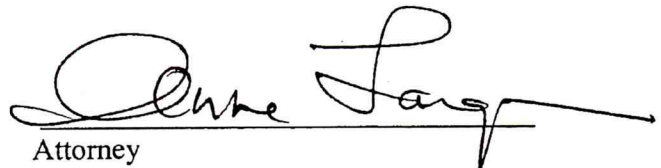
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:  
Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
Tina.joanos@sbafla.com  
Daniel.Beard@sbafla.com  
(850) 488-4406

This 22<sup>d</sup> day of November, 2013.

Copies furnished to:  
Via U.S. Mail  
Nancy English  
[REDACTED]  
Petitioner

Via electronic delivery:  
Brian A. Newman, Esquire  
Brandice D. Dickson  
Pennington, P.A.  
Post Office Box 10095  
Tallahassee, FL 32302-2095  
[slindsey@penningtonlaw.com](mailto:slindsey@penningtonlaw.com)  
Attorneys for Respondent

  
Attorney