

OPINION NO. 2011-039**Syllabus:**

2011-039

1. A person is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) after the Federal Election Commission determines that the person is eligible to receive payments pursuant to the Presidential Primary Matching Payment Account Act.
2. A person the Federal Election Commission determines is eligible to receive payments under the Presidential Primary Matching Payment Account Act is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) even though the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act.

To: Jon Husted, Secretary of State, Columbus, Ohio**By: Michael DeWine, Ohio Attorney General, October 18, 2011**

You have requested an opinion about filing a declaration of candidacy for the office of President of the United States with the Secretary of State under R.C. 3513.121(A). Specifically, you ask:

1. How should my office interpret what it means to be “eligible to receive payments under the ‘Presidential

Primary Matching Payment Account Act,” so that my office may properly accept for filing the materials of a presidential candidate who wishes to utilize the ballot access method in R.C. 3513.121(A)?

2. Assuming that a Federal Election Commission determination of “eligibility” is required, and those requirements are met by a presidential candidate, must that presidential candidate actually receive or accept federal matching funds in order to utilize the ballot access method in R.C. 3513.121(A)?

You have informed us that your office has reviewed R.C. 3513.121(A) and applicable federal law and answered these questions in the following manner:

In past years, this office has determined that R.C. 3513.121(A) refers only to a candidate for president who is “eligible to receive” federal matching funds, and, therefore, that the statute does not require the candidate’s actual receipt of those funds in order to utilize the ballot access method provided therein. Accordingly, this office has stated that any presidential candidate who receives formal notice from the [Federal Election Commission] that he or she is eligible to receive federal matching funds may utilize the ballot access method in R.C. 3513.121.

While the Attorney General may not provide definitive interpretations of federal law, we are able to advise you whether your interpretation of federal law comports with your duty to carry out the responsibilities imposed on your office by state and federal law. *See* 1988 Op. Att’y Gen. No. 88-007 at 2-21 and 2-22; 1985 Op. Att’y Gen. No. 85-007 at 2-25. Accordingly, for the reasons that follow, we concur in your interpretation of R.C. 3513.121(A) and applicable federal law as it pertains to who is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A).

R.C. 3513.121(A) states:

Any candidate for the presidency of the United States who is eligible to receive payments under the “Presidential Primary Matching Payment Account Act,” 88 Stat. 1297 (1974), 26 U.S.C.A. 9031, et seq., as amended, may file with the secretary of state a declaration of candidacy not later than four p.m. of the ninetieth day before the presidential primary election held in the same year the candidate is eligible to receive such payments. (Emphasis added.)

R.C. 3513.121(A) thus requires the Secretary of State to accept a person’s declaration of candidacy for the office of President of the United States if it is determined that the person is eligible to receive payments under the Presidential Primary Matching Payment Account Act.

Nothing in the language of R.C. 3513.121(A) or elsewhere in the Revised Code authorizes the Secretary of State to make determinations regarding a person’s

eligibility to receive payments under the Presidential Primary Matching Payment Account Act. Instead, pursuant to federal statutory law and administrative regulations, the authority to make such determinations is vested exclusively in the Federal Election Commission. See *LaRouche v. State Bd. of Elections*, 758 F.2d 998, 999 (4th Cir. 1985) (“[t]he Federal Election Commission . . . is responsible for determining whether presidential candidates are eligible for . . . matching fund payments” pursuant to 26 U.S.C. § 9033); *Dolbeare v. Fed. Election Comm’n*, No. 81 Civ. 4468-CLB, 1982 U.S. Dist. LEXIS 11811, at *8 (S.D.N.Y. Mar. 9, 1982) (the Federal Election Commission “is also entrusted with the responsibility of reviewing the Threshold submissions to determine if a candidate should be certified as eligible to receive matching payments” under the Presidential Primary Matching Payment Account Act).

On this point, 26 U.S.C. § 9033 establishes requirements that a person must meet before he is eligible to receive payments under the Presidential Primary Matching Payment Account Act. Under this statute, a person seeking to become eligible to receive payments under the Presidential Primary Matching Payment Account Act must submit the following written certifications and agreements to the Federal Election Commission:

(a) Conditions. To be eligible to receive payments under section 9037 [26 USCS § 9037], a candidate shall, in writing—

- (1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses,
- (2) agree to keep and furnish to the Commission any records, books, and other information it may request, and
- (3) agree to an audit and examination by the Commission under section 9038 [26 USCS § 9038] and to pay any amounts required to be paid under such section.

(b) Expense limitation; declaration of intent; minimum contributions. To be eligible to receive payments under section 9037 [26 USCS § 9037], a candidate shall certify to the Commission that—

- (1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035 [26 USCS § 9035],
- (2) the candidate is seeking nomination by a political party for election to the office of President of the United States,
- (3) the candidate has received matching contribu-

tions which in the aggregate, exceed \$5,000 in contributions from residents of each of at least 20 States, and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed \$250.

See 11 C.F.R. § 9033.1; 11 C.F.R. § 9033.2; 11 C.F.R. § 9036.1.

After a person submits the required certifications and agreements to the Federal Election Commission, the Federal Election Commission is required to determine whether the person is eligible to receive payments under the Presidential Primary Matching Payment Account Act. See 11 C.F.R. § 9033.4; 11 C.F.R. § 9033.10; 11 C.F.R. § 9036.1; *Comm. to Elect Lyndon La Rouche v. Fed. Election Comm'n.*, 613 F.2d 834 (D.C. Cir. 1979). If the Federal Election Commission determines that a person is eligible to receive payments under the Presidential Primary Matching Payment Account Act, the Federal Election Commission shall do the following:

Threshold certification by Commission. (1) After the Commission has determined under 11 CFR 9033.4 that the candidate has satisfied the eligibility and certification requirements of 11 CFR 9033.1 and 9033.2, the Commission will notify the candidate in writing that the candidate is eligible to receive primary matching fund payments as provided in 11 CFR part 9034.

(2) If the Commission makes a determination of a candidate's eligibility under 11 CFR 9036.1(a) in a Presidential election year, the Commission shall certify to the Secretary [of the Treasury], within 10 calendar days after the Commission has made its determination, the amount to which the candidate is entitled.

(3) If the Commission makes a determination of a candidate's eligibility under 11 CFR 9036.01(a) in the year preceding the Presidential election year, the Commission will notify the candidate that he or she is eligible to receive matching fund payments; however, the Commission's determination will not result in a payment of funds to the candidate until after January 1 of the Presidential election year.

11 C.F.R. § 9036.1(c); see also 26 U.S.C. § 9036; 11 C.F.R. § 9034.1(a). All determinations made by the Federal Election Commission regarding the eligibility of a person to receive payments under the Presidential Primary Matching Payment Account Act "are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9038 [26 USCS § 9038] and judicial review under section 9041 [26 USCS § 9041]." 26 U.S.C. § 9036(b).

Federal statutory law and administrative regulations thus require the Federal Election Commission to determine that a person is eligible to receive payments

under the Presidential Primary Matching Payment Account Act before the person may receive any payments under that Act. This means that a person is not eligible to receive payments under the Presidential Primary Matching Payment Account Act until the Federal Election Commission determines that the person is eligible to receive such payments.

To the extent that R.C. 3513.121(A) incorporates the federal requirement that a person be eligible to receive payments under the Presidential Primary Matching Payment Account Act, it follows that a person is not eligible to receive payments under the Presidential Primary Matching Payment Account Act for purposes of R.C. 3513.121(A) until the Federal Election Commission determines that the person is eligible to receive such payments. Moreover, after the Federal Election Commission determines that a person is eligible to receive payments under the Presidential Primary Matching Payment Account Act, R.C. 3513.121(A) authorizes the Secretary of State to accept the person's declaration of candidacy for the office of President of the United States. Accordingly, a person is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) after the Federal Election Commission determines that the person is eligible to receive payments pursuant to the Presidential Primary Matching Payment Account Act.

Your second question asks whether a person the Federal Election Commission determines is eligible to receive payments under the Presidential Primary Matching Payment Account Act is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) when the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act. As explained above, R.C. 3513.121(A) requires the Secretary of State to accept a person's declaration of candidacy for the office of President of the United States if the Federal Election Commission determines that the person is eligible to receive payments under the Presidential Primary Matching Payment Account Act.

There is no requirement in either federal or state law precluding the Secretary of State from accepting a person's declaration of candidacy for the office of President of the United States if the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act. In the absence of such a requirement, the Secretary of State is required to accept a person's declaration of candidacy for the office of President of the United States even though the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act. *See generally Scheu v. State*, 83 Ohio St. 146, 157-58, 93 N.E. 969 (1910) ("we must observe the rule that an exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience"). Therefore, a person the Federal Election Commission determines is eligible to receive payments under the Presidential Primary Matching Payment Account Act is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) even though the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A person is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) after the Federal Election Commission determines that the person is eligible to receive payments pursuant to the Presidential Primary Matching Payment Account Act.
2. A person the Federal Election Commission determines is eligible to receive payments under the Presidential Primary Matching Payment Account Act is eligible to file a declaration of candidacy for the office of President of the United States with the Secretary of State pursuant to R.C. 3513.121(A) even though the person has not received or accepted payments pursuant to the Presidential Primary Matching Payment Account Act.