

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: April 26, 2021
To: Veterans and Legal Affairs Committee
From: Janet Stocco, Legislative Analyst
LD 1121 **An Act To Create an Open and Streamlined Primary System** (*Sen. Baldacci*)

SUMMARY

Presidential Primary Date. The bill changes the date of the presidential primary from the first Tuesday after the first Monday in March to the second Tuesday of June, the date on which nonpresidential primary elections are conducted in Maine. (*Compare bill §12 and §25*)

Open Primaries. The bill also establishes a new “open primary” procedure for (*Bill §2*):

- *Federal offices:* United States Senator & Representative to Congress
- *State offices:* Governor, State Senator, and State Representative.

Presidential primaries and primary elections for county offices are **not** open primaries under LD 1121.

All open primary candidates are listed on a single primary election ballot. (*Bill §26*)

- *A party candidate* qualifies to appear on the ballot with the candidate’s party designation listed by: being enrolled in the party on or before March 15th of the election year and obtaining the number of verified signatures of registered party voters in the electoral district required under current [§335\(5\)](#) on a party primary petition between January 1 and March 15 of the election year.
- *An unenrolled candidate* qualifies to appear on the ballot not being enrolled in a party after March 1st of the election year and obtaining the number of verified signatures of registered voters in the electoral district required under current [§354\(5\)](#) on a nomination petition between January 1 and March 15 of the election year. (*Bill §18*)
- *Declared write in candidates.* The process to become a declared write-in candidate in an open primary election is the same as the process in [§722-A](#) of current law: the candidate must file a declaration of write-in candidacy with the Secretary of State by the 60th day before the election.
- *Withdrawal of open primary candidates.* If a candidate for an open primary withdraws from the open primary for any reason, the candidate may not be replaced. As in current law, the name of a candidate who withdraws from the ballot within 70 days of the election will not be removed from the ballot, but notice of the withdrawal must be mailed with absentee ballots and posted in the voting place and on the Secretary of State’s publicly accessible website. (*Bill §22 & §29*)

All qualified voters, regardless of enrollment status, are eligible to vote in the primary. (*Bill §26 & §30*) Unlike under current law, a voter who changes parties within 15 days of the primary election may nevertheless vote in an open primary election. (*Bill §6-§7*)

The top-2 candidates, tabulated by ranked-choice voting, proceed to the general election. (*Bill §35, §36 & §39.*). If there is a tie between the top 2 candidates in the open primary, it need not be resolved. If there is a tie between the 2nd and 3rd place candidate, as in other RCV elections the tie is decided by lot, with the candidate chosen by lot defeated.

- *Withdrawal of general election candidates:* The two winning open primary candidates may not voluntarily withdraw from the general election for the office. (*Bill §23*) If one of the candidates dies or becomes disqualified, the candidate’s name will not be removed from the ballot and votes for that candidate will be counted. If that candidate wins the general election, a vacancy will be declared at the beginning of the term for which the candidate was elected and a special election must be held. (*Bill §20*) A notice explaining the fact of and implications of a general election candidate’s death or disqualification must be mailed with absentee ballots and posted in the voting place and on the Secretary of State’s publicly accessible website. (*Bill § 23 & §29*)
- *Declared write-in candidates prohibited.* A person may not become and a voter may not vote for a declared write-in candidate for a general election that follows an open primary election. (*Bill §34 & §31*) The Secretary of State must design the ballots so that no blank space for a write-in candidate is placed below the names of the 2 candidates for the general election. (*Bill §27*)

At a general election following an open primary, the candidate who wins a plurality of the votes cast is declared the winner. (*Bill §37*) This is a change from current law, under which both the primary and the general elections for U.S. Senator and U.S. Representative to Congress are conducted by ranked-choice voting. See [21-A M.R.S. §1\(27-C\)](#).

ADDITIONAL INFORMATION

A. Current laws governing non-presidential party primaries in Maine. (*Citations are to Title 21-A*)

Who may vote in a primary?	<p>Default Rule: A voter must be enrolled in a party to vote in that party’s primary election. §340(1).</p> <p>Exception - party choice: A party may notify the Secretary of State by Feb. 1st “of the enrollment qualifications” to participate in its primary elections. §340(1). One restriction exists, however: A party may not authorize the participation in their primaries of voters who have changed their party enrollment from one party to another (without also changing their municipality of registration) in the 15 days prior to the primary. §144(2).</p>
Party enrollment process.	<p>Default Rule: An unenrolled voter may enroll in a party at any time, up to and including on the day of an election. §142; §143-A.</p> <p>Exceptions - change in party enrollment:</p> <ul style="list-style-type: none"> • Switch parties: A voter who changes the voter’s party enrollment from one party to another may not vote in a primary election for 15 days—unless the voter concurrently switches the voter’s municipality of residence. §144(3). • Withdraw: A voter who withdraws from a party may re-enroll in the voter’s former party and vote in that party’s primary election but may <u>not</u> enroll in a new party for the first 15 days after unenrolling—unless the voter concurrently switches the voter’s municipality of residence. §145(2).
Primary vote tabulation	<p>Primary elections for the offices affected by LD 1121—U.S. Senator, U.S. Representative to Congress, Governor, State Senator and State Representative—are all currently conducted by ranked-choice voting (RCV), with the party candidate who wins</p>

	the majority of the votes cast in the final round of tabulation for each party’s primary being declared the winner of the party’s primary election. §1(27-C) ; §723-A .
General election.	Each party primary winner appears on the general election ballot along with any unenrolled candidates who qualify to appear on the ballot by nomination petition. §351-§357 . Party candidates who withdraw from the general election may be replaced, unless they voluntarily withdraw after the deadline in July. §374 . Voters may also choose to vote for declared write-in candidates in the general election. §722-A . General elections for U.S. Senator and U.S. Representative to Congress are conducted by RCV, §1(27-C) , and general elections for Governor, State Senator and State Representative are conducted by plurality voting, §723 .

B. Related Pending Legislation.

LD 231 (Maxmin)	Semi-open primaries: unenrolled voters may choose to participate in any one
LD 303 (Lookner)	party’s primary election; LD 231 also applies to presidential primary elections.
LD 1363 , §6 & §8 (Secretary of State)	Would limit political parties to allowing only unenrolled voters, not voters in other parties, to participate in their primary and presidential primary elections.

C. Primary Elections in Other States.

NCSL’s January 2021 summary of state primary laws is attached to this bill analysis. For a more in-depth review of state primary laws, see NCSL’s November 2020 report: [Primaries: More than One Way to Find a Party Nominee](#).

- Three states (California, Washington and Nebraska) use a “top two” or “jungle primary” system for at least some offices. Under this format, all party and unaffiliated candidates appear on the same primary ballot and all voters are eligible to vote, regardless of party affiliation or lack of affiliation. The two candidates who receive the most votes in the primary appear on the general election ballot.
- Louisiana has a similar “top two” system, but the election is conducted on general election day in November. If a candidate receives a majority of votes on that day, the candidate is elected outright; otherwise, a run-off election between the top two candidates occurs 6 weeks later.
- Under Alaska’s new “Nonpartisan Top 4 Primary,” beginning in August 2022, all party and nonparty candidates will appear on the same primary ballot and all voters, regardless of party status, are eligible to vote for one candidate per office. The top 4 candidates advance to the general election, which will be conducted by ranked-choice voting. See <https://www.elections.alaska.gov/Core/RCV.php>.

E. Constitutional concerns.

In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the U.S. Supreme Court concluded that Washington’s jungle primary system did not violate the First and Fourteenth Amendment association rights of political parties, because the primary did not purport to select a *party’s nominee* for the political office.

ISSUES FOR CONSIDERATION

A. Financial Impact of LD 1121. The Secretary of State testified that, on the one hand, implementation of LD 1121 will lead to increased administrative costs for “ballot design, mailing materials, technology and coding changes, public education efforts, and staffing to answer questions

from candidates, municipal election officials, the press, and the public.” On the other hand, moving the presidential primary to the date of other Maine primaries will reduce both the State and municipal election expenses.

B. Other concerns. Although not raised in the testimony provided on LD 1121 this session, when a similar bill—[LD 114](#), *An Act To Establish Open Primaries for Certain Federal and State Offices*—was presented in the 129th Legislature, the following issues were raised for this committee’s consideration:

- County primary elections are not included (and under LD 1121 presidential primaries are not included). The lack of uniformity may cause voter confusion regarding the differences between closed and open primaries on the same day.
- Should the Maine Clean Election Act distribution amounts be amended to reflect the participation of unenrolled gubernatorial and legislative candidates in open primary elections? See [21-A M.R.S. §1125\(10\)](#) (all unenrolled candidates receive primary election distributions in the same amount as party candidates who participate in *uncontested* primary elections).
- Concerns were raised regarding the different signature requirements for party candidates and unenrolled candidates who will appear on the same open primary ballot:

	Party candidate signatures §335 Who signs: party voters in district	Unenrolled candidate signatures §354 Who signs: any voter in district
U.S. Senator	2,000 – 3,000	4,000 – 6,000
U.S. Representative	1,000 – 1,500	2,000 – 3,000
Governor	2,000 – 3,000	4,000 – 6,000
State Senator	100 – 150	200 – 300
State Representative	25 – 40	50 – 80

- Because the deadline for filing unenrolled candidate petitions is changed to March 15, to match the deadline for filing party candidate petitions, it was suggested that it will cause delays in municipal official verification of petition signatures and Secretary of State certification of petitions.

TECHNICAL AND DRAFTING ISSUES

1. Unnecessary provisions?

Bill §27 directs the Secretary of State **not** to include a blank space for write-in candidates at the end of the list of nominees for a general election following an open primary. Therefore, bill §32—which prohibits election officials from counting a vote in such elections if the voter marked the write-in indicator—is likely unnecessary.

Bill §35 provides that the plurality candidate is not the winner of an open primary election; however, the affected statute already provides that the plurality candidate is not the winner of “elections determined by ranked-choice voting”—defined in bill §1 to include all open primary elections.

2. Conflicts with LD 1363. Several provisions of LD 1121 conflict with other changes made by other bills this session, most notably LD 1363. If both bills are enacted, it might be possible to address these conflicts through the errors bill. Otherwise, these conflicts must be addressed next session.

FISCAL IMPACT

Not yet determined.