

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

Sent by email only to erik@unitedwisconsin.com

May 23, 2014

Erik Kirkstein
Political Director
United Wisconsin

Dear Mr. Kirkstein:

In an email dated April 9, 2014, you requested a written opinion regarding the number of days in advance a referendum question must be submitted for placement on the ballot. Specifically, you note a potential conflict between the language in Wis. Stat. §9.20(4) pertaining to direct legislation and that in Wis. Stat. §8.37 regarding the deadline for submitting petitions requesting that a referendum question be placed on the ballot.

Wis. Stat. §9.20(4) governs the timing of a direct legislation referendum in the event that a city council or village board has chosen not to adopt the proposed resolution or ordinance as presented in a valid petition, and it states:

The common council or village board shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, **or submit it to the electors at the next spring or general election, if the election is more than 6 weeks after the date of the council's or board's action on the petition or the expiration of the 30-day period**, whichever first occurs. If there are 6 weeks or less before the election, the ordinance or resolution shall be voted on at the next election thereafter. The council or board by a three-fourths vote of the members-elect may order a special election for the purpose of voting on the ordinance or resolution at any time prior to the next election, but not more than one special election for direct legislation may be ordered in any 6-month period. *Emphasis added.*

As you note, this provision appears to require that the referendum appear on the ballot during the next regular spring or general election unless the election is less than 6 weeks (42 days) after the governing body either rejects the proposed legislation or 30 days pass after the clerk's certification that the petition is valid. The governing body may also call a special election to consider proposed direct legislation. As you also note, however, Wis. Stat. §8.37 states:

Unless otherwise required by law, all proposed constitutional amendments and any other measure or question that is to be submitted to a vote of the people, or any petitions requesting that a measure or question be submitted to a vote of the people, if applicable, **shall be filed with the official or agency responsible for preparing the ballots for the election no later than 70 days prior to the**

election at which the amendment, measure or question will appear on the ballot.
Emphasis added.

While a county clerk may physically create a ballot containing a municipal referendum, that task is done on behalf of the municipal clerk who is responsible for preparing the ballot question. Therefore, the deadline for filing a direct legislation question applies to the time that the proposed measure is in the hands of the municipal clerk following either the governing body's rejection of the proposal or the lapse of the 30-day time period without the governing body taking action. The deadline is not measured from the date that petitioners file the direct legislation petition with the municipal clerk or the date of the clerk's certification of the petition to the governing body.

The phrase, "Unless otherwise required by law," at the beginning of s. 8.37 might imply that the more specific language and shorter deadline in s. 9.20 always applies to referendum elections resulting from direct legislation petitions. However, the staff of the Government Accountability Board does not believe that would be the correct interpretation of the statutes, at least in the case of questions to be placed on the fall partisan primary or general election ballots or the presidential preference primary.

The purpose of the 70-day deadline in s. 8.37 is to ensure that municipal and county clerks have sufficient time to prepare and print ballots so that they are available 47 days before the partisan primary or general election, as required by Wis. Stat. §7.15(1)(cm). That provision states that municipal clerks must deliver absentee ballots to electors who have requested them 47 days in advance of any presidential preference primary, partisan primary, or general election.

The 70-day deadline in s. 8.37 was previously 42 days but it was amended by 2011 Act 75. That legislation brought Wisconsin into compliance with federal law by moving the partisan primary from September to August and altering a number of corresponding deadlines related to ballot preparation and delivery. Therefore, the "otherwise required by law" in s. 8.37 language does not give precedence to s. 9.20 because it conflicts with state and federal laws that require absentee ballots to be available for military electors sooner than the 42-day deadline established in s. 9.20.

Rather, the "otherwise provided by law" phrase must be interpreted in the context of the purpose of the 70-day deadline, which was simply to accommodate the process of preparing and printing of ballots. In the opinion of the Government Accountability Board, if a clerk receives a referendum question after the 70-day deadline and can include it on the ballot without disrupting or delaying the printing of ballots, then the question should be included on the ballot. If ballots are already being printed and the municipality would incur additional costs by including a referendum question, then the clerk is not required to include the referendum question on the ballot.

Wis. Stat. §7.15(1)(cm) requires municipal clerks to make absentee ballots available to electors 21 days before each spring election and therefore the 42-day deadline in s. 9.20 does not necessarily conflict with that obligation. Given that the statutes permit printing ballots later in the process for spring elections and that the more specific deadline for direct legislation questions does not interfere with the creation of those ballots, the "otherwise provided by law" language seems to supersede the 70-day deadline in s. 8.37. In the opinion of the Board, clerks must place direct legislation questions on the ballot at a spring (or special) election if the

governing body has rejected the proposal, or if the 30-day period for governing body action has elapsed, at least 42 days before the election. In addition, clerks should include such questions on the ballot if they are filed later than that deadline if doing so will not disrupt or delay making ballots available 21 days before the election.

I hope this information is helpful but please contact us if you have any additional questions. This advisory opinion was approved by the Government Accountability Board at its meeting of May 21, 2014, pursuant to Wis. Stat. §5.05(6a).

Government Accountability Board

A handwritten signature in cursive script that reads "Michael Haas".

Michael Haas
Elections Division Administrator