

Referendum Elections

A Guide to Understanding

- Referenda
- Ballot Questions &
- Direct Legislation (Voter Initiatives)



November 2019

INTRODUCTION – WHAT IS A REFERENDUM?

Wis. Stat. § 5.02(16s) defines “referendum” as an election at which an advisory, validating or ratifying question is submitted to the electorate.” Broadly speaking, “referendum” or “referenda” are general terms that refer to a question appearing on the ballot to be voted on by voters. A referendum can arrive on the ballot through a number of means, for example, by action of a governing body explicitly placing a question on the ballot, some indirect action of a governing body which triggers a referendum, or through circulation of a petition by a voter (direct legislation) in a city or village. Except for most types of advisory (non-binding) referenda, the placement of referenda on a ballot in Wisconsin is governed by specific statutes. The statutory references to particular referenda are numerous in Wisconsin law and mostly outside of the WEC’s jurisdiction, therefore this guide will not cover every referendum permitted by statutes. While this guide provides general information regarding referenda, legal counsel specializing in the subject matter that permits or requires a referendum to be held in certain circumstances should be consulted to ensure that compliance with all requirements are met.

HOW DOES A REFERENDUM GET ON THE BALLOT?

The most common types of referenda are advisory referendum, direct legislation, petition referendum and binding referendum. The governing body is responsible for approving the form of the question on the referendum. The process for placing these types of referendum on a ballot are discussed below.

- **Advisory Referendum:** These are non-binding questions which poll or survey the electorate to elicit their views on a question, but do not have the force of law. Advisory referenda are placed on the ballot by action of the governing body at a public meeting, generally by introduction and passage of a resolution to include a specific question on the ballot. Some municipalities may have local ordinances that allow for voters to petition for placement of an advisory referendum on the ballot, but in almost all cases there is no state law mandating that a governing body consider or act on a request for an advisory referendum, either on its own motion or in response to a petition. One exception is an advisory referendum that is required after a valid petition is filed regarding the dissolution of a school district. *Wis. Stat. § 117.10(3)*. Recent common examples of advisory referenda include:

- Prohibiting ATVs on municipal roads,
- Legalizing marijuana
- Campaign Finance/Political Speech
- “Dark store” loophole

Wisconsin Statutes also give no legal effect to the results of an advisory referendum, other than the weight that the governing body voluntarily assigns to the results. If held, a governing body may give the results of an advisory referendum any amount of weight, or no weight at all, in determining a policy decision.

More detailed guidance regarding advisory referendum procedures previously issued by the Wisconsin Elections Commission is included as Appendix A.

- **Direct Legislation:** The direct legislation process is governed by Wis. Stat. § 9.20. In a village or city, electors can initiate the direct legislation process of circulating a petition and collecting the required number of signatures insisting on the passage of an ordinance or resolution. If the governing body fails to pass the ordinance attached to the valid petition containing the required number of signatures within 30 days of its certification by the clerk, then the question of passage is put to the voters via referendum at a Spring or General Election. A direct legislation referendum is always binding, and an ordinance or resolution adopted by a direct legislation referendum cannot be repealed or amended by the governing body for two years. Town boards, school boards and county boards are not subject to direct legislation petitions.

- **Petition Referendum:** In contrast to direct legislation which does not permit repeal of an existing ordinance, in some very narrow specific cases, electors can reverse, via referendum, an action taken by a governing body. Other than specific statutes authorizing it, repeal of an existing law is not permitted by referendum. Examples of statutes authorizing repeal of a governing body action include:
 - Abolishment/Creation of the office of county executive. Wis. Stat. § 59.17.
 - Approval/Rejection of a charter ordinance adopted by a city council or village board. Wis. Stat. § 66.0101(5).
 - Approval/Disapproval of adoption of a cooperative plan regarding municipal boundaries. Wis. Stat. § 66.0307(4)(e)(2).

- **Binding Referendum:** Finally, binding referenda are submitted to the voters for approval or rejection of a specific course of action. For example:
 - Amendments to the Wisconsin Constitution require a statewide referendum after approval by two consecutive sessions of the legislature. Wis. Constitution Art. XII, Sec. 1.
 - School referendum to exceed spending caps or to authorize borrowing. Wis. Stat. § 121.91.
 - Municipal referendum to authorize borrowing. Wis. Stat. § 67.05.
 - Changing the process of selecting a town officer from election to appointment. Wis. Stat. § 60.30.

Appendix B to this manual contains a list of Wisconsin statutes concerning different areas of law mentioning referenda that may be useful as starting point of research if the question of whether a referendum is required or allowed arises.

TIMING

The timing of a referendum – when the decision is made to put it on the ballot and at what election it is to be placed on the ballot – varies greatly and may be specified by the statute authorizing the referendum. However, when a more specific statute does not specify, there is a general rule that applies to referenda timing. Generally, a question to be placed on the ballot must be delivered to the clerk responsible for preparing the ballot at least 70 days prior to the election at which the measure will appear on the ballot. Wis. Stat. § 8.37. Typically, this means that municipal or school referendum

questions to be included on a regularly scheduled election ballot must be filed with the county clerk at least 70 days before the election or with the municipal clerk in the event of a special municipal election. The Wisconsin Elections Commission has advised that the clerk responsible for preparing the ballot has discretion to include the question on the ballot if it is filed later than 70 days prior to the election, if doing so will not delay the preparation and delivery of ballots to absentee voters.

NOTICE AND PROCEDURAL REQUIREMENTS

A referendum election, whether binding or advisory, is a public election subject to all the procedural requirements as other elections, including the posting and publication of election notices; responsibilities of clerks, special voting deputies and election inspectors; absentee ballot procedures; use of electronic voting equipment; and canvassing of election results. Specifically, Wis. Stat. § 5.64(2) governs the form of the referendum ballot. Also, in the case of a referendum that is not scheduled on the date of a regular election, Wis. Stat. § 8.55 governs election notice requirements for a special referendum. Here is a general overview of the types of notices:

- **Type A: Notice of Election** – This is an announcement that an election will occur in the near future. For a special municipal or school district referendum, publication is on the 4th Tuesday preceding the primary or election where the referendum would appear.
- **Type B: Sample Ballot and Voting Instructions** – This notice contains voting instructions and a copy of each type of ballot to be voted on. The Type B Notice is published on the Monday before a regularly scheduled election or on the day before a special election.
- **Type C: Notice of Referendum** – This notice informs voters that a referendum will appear on the ballot and includes an explanation of the effect of a “Yes” or “No” vote on the question. The Type C Notice is published on the Monday before a regularly scheduled election or on the day before a special election.
- **Type D: Hours and Location of Polling Places** - The Type D Notice listing polling place hours and locations is published on the Monday before a regularly scheduled election or on the day before a special election.

See *Wis. Stat. §§ 8.55, 10.01 and 10.06.*

WORDING AND FORMATTING THE QUESTION AND ANSWER

Regarding the wording of referenda, Wis. Stat. § 5.64 provides that “The ballot shall give a concise statement of each question in accordance with the act or resolution directing submission in the same form as prescribed by the commission under s. 7.08(1)(a). The question may not be worded in such a manner as to require a negative vote to approve a proposition or an affirmative vote to disapprove of a proposition.”

The Elections Commission recommends that referendum questions typically should not be structured as multi-part questions that, for instance, only permit voters to answer a second question if they have voted yes to the first question.

Multiple-choice questions are not permitted, except with respect to advisory referenda that are not otherwise required to conform to a specific format. The Wisconsin Elections Commission has advised that an advisory referendum question could comply with the statutory requirements by properly framing a multiple-choice question. The opinion concluded that the key is to ensure that all voters are provided the opportunity to vote upon all questions by carefully drafting the question and the options listed. The possible responses should be distinct and cover all options in order to provide effective and accurate feedback to policymakers. It is often a best practice to include a catch-all response such as “None of the above” to ensure that the positions of all voters are accurately captured by the results of a multiple-choice question.

Most advisory referendum questions are not specifically addressed in the Statutes except as a type of referendum defined in Wis. Stat. § 5.02(16s). Due to the lack of specific statutory restrictions and because their results are non-binding, the opinion of WEC staff is that local governing bodies are afforded some latitude in framing advisory referendum questions depending upon the specifics of the issue and the public feedback which is sought. Municipal clerks may wish to consult with their voting equipment vendors to ensure that the structure and length of the referendum question can be accommodated by the equipment and programming that is used.

Please note that, whether a referendum is posed as a multiple-choice question or not, there are practical considerations related to the length of the question and possible responses. Questions that exceed 5,000 characters and answers that exceed 100 characters will create administrative issues in both the WisVote system and on the MyVote Wisconsin website where the text fields for contests are limited. WEC staff recommends limiting the question field to no more than 5,000 characters (including any introductory language) and the response fields to no more than 100 characters. If questions that exceed these limits are being considered or are approved, please contact WEC staff to discuss wording of the question on the ballot and in WisVote.

WEC JURISDICTION AND OTHER RESOURCES

The Wisconsin Elections Commission (WEC) has jurisdiction regarding the administration of elections, including the conduct of referendum elections. The direct legislation petition process and consideration by the common council or village board is governed by Wis. Stat. § 9.20 and is therefore under the jurisdiction of the WEC.

However, there are some aspects of direct legislation and other referendum processes that are not under the sole jurisdiction of the WEC. For example, the case notes following Wis. Stat. § 9.20 in the Wisconsin Statutes describe several exceptions to the electorate’s right to petition for direct legislation. The WEC has concluded that it does not have the authority to resolve any dispute regarding whether the subject matter of a direct legislation petition is proper. Any such dispute does not fall under the WEC’s complaint process pursuant to Wis. Stat. § 5.06 and any complainant challenging whether the subject matter of a petition is proper may proceed directly to circuit court without first filing a complaint with the WEC.

In addition, there are many statutes authorizing or requiring a referendum election in specific circumstances, as illustrated by the Appendix to this Manual. While the WEC may have jurisdiction to provide guidance and resolve issues related to the conduct and administration of such referendum elections once an election is ordered, it is not the sole authority regarding other aspects of the process for particular referendum questions, such as determining when a referendum is required or permitted, the process for initiating a referendum, and whether the wording of a referendum is proper. Finally, the WEC typically does not have jurisdiction to resolve any questions regarding the effect of the passage of a referendum question.

Other sources of information regarding these issues include the municipal or school district attorney or county corporation counsel, as well as the statewide associations of municipalities, towns, counties, and school districts. Other state agencies may also play a role, such as the Department of Revenue or Department of Public Instruction when specific referendum questions relate to municipal borrowing or school district organization and structure, for instance.

FREQUENTLY ASKED QUESTIONS

Q: If a referendum is advisory/non-binding, does it need to be distinguished in that way on the ballot?

A: The referendum may be labeled as advisory if the governing body specifically included that it be labeled as an advisory referendum in its resolution.

Q: What additional tasks must be completed in WisVote when a referendum is going to be on the ballot?

A: The referendum will need to be added as a “contest” in WisVote under the appropriate election. Election officials needing assistance may contact the WEC WisVote team.

Q: When a referendum is brought to the ballot via the direct legislation process, must the entire wording of the proposed ordinance or resolution appear on the ballot?

A: It is not necessary that the full wording of the proposed ordinance or resolution appear. A concise statement of the nature of the proposal may be used if the full ordinance or resolution cannot appear and must permit the voter to clearly indicate approval or rejection by a “yes” or “no” vote. The entire resolution appears on the Type C Notice. See Wis. Stat. §§ 9.20(6) and 10.01(2)(c).

Q: The Type C Notice is required to be posted wherever voting is taking place. Can material relating to a referendum be posted at a location where voting is taking place?

A: Electioneering material intended to influence voting at an election is not permitted. Wis. Stat. § 12.03. Additionally, no person may post or distribute “election-related material” during polling hours at a polling place on Election Day or within 100 feet of an entrance to a polling place. Election-related material describes, or purports to describe, the rights or responsibilities of individuals voting or registering to vote at a polling place or voting an absentee ballot. Wis. Stat. § 12.035.

Q: Who is responsible for costs related to a referendum?

A: For a referendum held in conjunction with a regularly scheduled election, the jurisdiction conducting the referendum is responsible for certain pro-rated election costs. For special elections, the jurisdiction conducting the referendum is responsible for all election-related costs. Wis. Stat. § 5.68. For more information, please refer to the *Cost of Elections* chart, page 129 in the Election Administration Manual:

https://elections.wi.gov/sites/electionsuat.wi.gov/files/publication/65/election_administration_manual_october_2016_pdf_91094.pdf#page=231

Q: Is accessible voting equipment required at polling places for special elections and referenda?

A: Yes, accessible voting equipment is required at all elections including special referendum elections, in all polling places. Wis. Stat. § 5.25(4).

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DATE: July 5, 2018

TO: Wisconsin County Clerks
Wisconsin Municipal Clerks
Milwaukee County Election Commission
City of Milwaukee Election Commission

FROM: Meagan Wolfe
Interim Administrator

Michael Haas
Staff Counsel

SUBJECT: Advisory Referendum Petitions Frequently Asked Questions

Occasionally the Wisconsin Elections Commission receives inquiries regarding the process for reviewing petitions requesting a local advisory referendum election, and the process for conducting such elections. In addition, it has become increasingly popular for interested groups to organize coordinated campaigns promoting advisory referendum petitions at the municipal and county levels on specific topics, in order to encourage state or federal policymakers to consider the results of referendum elections regarding the same or similar questions. In the minds of some, advisory referendum elections can be an important opportunity for public input into policymaking decisions. To others, an advisory referendum election is simply a “glorified straw poll” and detracts from the principles of representative democracy.

As a general matter, the definition of “referendum” in Wis. Stat. § 9.02(1) includes elections involving advisory, validating or ratifying questions. Therefore, if an advisory referendum election is ordered by a governing body, it must comply with the administrative requirements of other elections. But there is no general right of citizens to petition for an advisory election contained in the Wisconsin Constitution or Wisconsin Statutes. Nevertheless, citizens and local policymakers sometimes advocate using an advisory referendum election to gauge the public’s support for or opposition to either specific projects or policy decisions. Advisory referendum petitions are distinct from direct legislation petitions which may be submitted in Wisconsin cities and villages, the review and processing of which are governed by Wis. Stat. § 9.20.

With that background, following is a summary of guidance which the WEC and its predecessor agencies, the Government Accountability Board and the State Elections Board, have provided to local election officials regarding advisory referendum petitions and elections. Please note that this guidance is subject to any separate and specific statute related to the subject matter of a referendum. For example, Wis. Stat. § 117.10(3) requires an advisory referendum when a valid petition is filed

regarding the dissolution of a school district. In that case the statute dictates the number of signature needed to request an advisory referendum and requires holding an advisory referendum if the petition is sufficient. The guidance below is intended for circumstances in which no specific statute regarding the subject matter of a referendum supersedes the general election laws.

1. What are the options for a local jurisdiction which receives a petition requesting an advisory referendum?

Because there is no general right to petition for an advisory referendum, a municipality or county has a range of options after receiving such a petition. For instance, the jurisdiction may take no action regarding the petition, may review the petition to determine the number of valid signatures on the petition, may discuss the petition and its subject matter at a meeting of the governing body, or may order that an advisory referendum election take place posing the question listed in the petition or some alternative form of the question approved by the governing body.

Depending on the timing of the petition's submission to the clerk in relation to the next meeting of the governing body, the clerk may wish to seek the governing body's direction regarding whether or not to review the petition. Alternatively, the clerk may review the petition to determine the number of valid signatures and present those findings to the governing body for its consideration. There is no legal obligation for a clerk to process or review an advisory referendum petition unless directed to do so by the governing body or by a specific statute related to the subject matter.

2. If the clerk or governing body wish to process and review an advisory referendum petition, what are the requirements for the form of the petition?

Wis. Stat. §8.40 governs the requirements of election petitions, including for a referendum. That statute requires election petitions to include the heading "Petition" as well as the signature, address and printed name of each signer, along with the certification of the circulator. The sufficiency of petition signatures is further governed by EL Ch. 2, Wis. Adm. Code. It should be noted, however, that a governing body may choose to order an advisory referendum on a particular topic despite any deficiencies in a petition requesting such an election.

3. If the clerk or governing body wish to process and review an advisory referendum petition, how many valid signatures are required for the petition to be sufficient?

Because there is no statutory requirement that a governing body act on an advisory referendum petition, there is also no general requirement that a municipal or county clerk review such a petition, and there is no standard for determining the number of signatures which make it sufficient, absent a directive from the governing body.

In comparison, petitions requesting direct legislation require valid signatures equal to at least 15 percent of the votes cast for governor at the last gubernatorial election in the city or village, and recall petitions require valid signatures equal to at least 25 percent of the votes cast for governor at the last election within the same district as that of the officeholder being recalled. Governing

bodies may take these requirements into account when assessing the support indicated by an advisory referendum petition, but they do not govern the treatment of such petitions.

4. What are the deadlines for the clerk to review an advisory referendum petition and for the governing body to act on it?

Because there is no general statutory requirement to act on an advisory referendum petition, in most cases there are no deadlines for the clerk to review the petition signatures, or for the governing body to consider or act on such a petition. Again, the timelines for the review of recall petitions (31 days under Wis. Stat. 9.10(3) and (4)) and for acting on a direct legislation petition (30 days following clerk's certification under Wis. Stat. 9.20(4)) may be instructive but are not binding for advisory referendum petitions.

If a local governing body wishes to order an advisory referendum election, the question must be delivered to the clerk responsible for preparing the ballot at least 70 days prior to the election at which the measure will appear on the ballot. Typically, this means that municipal referendum questions to be included on a regular election ballot must be filed with the county clerk at least 70 before the election, and that advisory referendum questions to be voted on at a municipal special election must be approved and filed with the municipal clerk under the same deadline. The clerk responsible for preparing the ballot has discretion to include the question on the ballot if it is filed later than 70 days prior to the election, if doing so will not delay the preparation and delivery of ballots to absentee voters.

For the 2020 General Election on November 6, 2020, the 70-day deadline is August 25, 2020.

5. May a local governing body order the scheduling of an advisory referendum within its jurisdiction absent the submission of a petition?

Yes, both the Legislature and local governing bodies may authorize and order an advisory referendum election independent of a petition request. An advisory referendum election may be scheduled to occur on the same date as a regularly scheduled election or as a special election.

6. If a governing body orders an advisory referendum election, what procedural requirements apply to the conduct of the election?

An advisory referendum election is a public election subject to all of the procedural requirements as other elections, including the posting and publication of election notices; responsibilities of clerks, special voting deputies and election inspectors; absentee ballot procedures; use of electronic voting equipment; and canvassing of election results. Specifically, Wis. Stat. § 5.64(2) governs the form of the referendum ballot. Also, in the case of an advisory referendum that is not scheduled on the date of a regular election, Wis. Stat. § 8.55 governs election notice requirements for a special referendum.

7. May an advisory referendum ballot contain a multiple-choice question?

Wisconsin Statutes are silent regarding whether a referendum can be framed as a multiple-choice question, particularly with regard to advisory referendum elections. Wis. Stat. § 5.64(4) states that a referendum question “may not be worded in such a manner as to require a negative vote to approve a proposition or an affirmative vote to disapprove a proposition.”

While the state elections agency has not adopted formal guidance on this question, the previous State Elections Board did issue an informal advisory opinion concluding that an advisory referendum question could comply with this statutory requirement by properly framing a multiple-choice question. The opinion concluded that the key is to ensure that all voters are provided the opportunity to vote upon all questions by carefully drafting the question and the options listed. The possible responses should be distinct and cover all options in order to provide effective and accurate feedback to policymakers. It is often a best practice to include a catch-all response such as “None of the above” to ensure that the positions of all voters are accurately captured by the results.

Because most advisory referendum questions are not specifically addressed in the Statutes, and because their results are non-binding, the opinion of WEC staff is that local governing bodies are afforded some latitude in framing the question depending upon the specifics of the issue and the public feedback is sought.

Referendum questions typically should not be structured as multi-part questions that, for instance, only permit voters to answer a second question if they have voted yes to the first question.

8. What happens if a county board has ordered an advisory referendum election for a question that is the same or similar to one authorized by a municipal governing body? Must both questions be listed on the ballot?

This situation is becoming more common with the increase in organized efforts to seek advisory referendum elections in numerous jurisdictions in order to influence state or federal officials. It is also a situation that requires and benefits from communication between the clerks and elected officials of the counties and municipalities involved.

The short answer is that a county clerk must honor timely requests to include referendum questions from all jurisdictions. This may tend to create confusion for voters, however, if they are asked to vote twice on an identical question, once as a municipal referendum and once as a county referendum. It may also create confusion if there is a slight difference in the wording of the question even though the substance is identical, and voters must discern the significance of any variations in the questions.

Voter confusion may be reduced by effective communication between jurisdictions in advance of an order to conduct an advisory referendum. If a county board has authorized an advisory referendum on a question that also interests a municipal governing body, the municipality may wish to simply adopt the results of the county referendum in the municipality. In that case the

municipal governing body should vote to rescind its referendum election and clearly communicate to the county clerk and to the public that the municipality will not conduct its own referendum election. If both the county and the municipality wish to conduct their own advisory referendum, some thought should be given to whether the question can and should be posed in an identical manner.

If you have any questions regarding this guidance or believe other topics should be included in this FAQ document please contact the WEC Help Desk at 608-261-2028 or elections@wi.gov.

Appendix B: Statutes mentioning referenda

Chapter 5: Elections—General Provisions; Ballots and Voting Systems

Chapter 6: The Electors

Chapter 7: Election Officials; Boards; Selection and Duties; Canvassing

Chapter 8: Nominations, Primaries, Elections

Chapter 9: Post-Election Actions; Direct Legislation

Chapter 10: Election Notices

Chapter 12: Prohibited Election Practices

Chapter 13: Legislative Branch

Chapter 19: General Duties of Public Officials

Chapter 24: Public Domain and the Trust Funds

Chapter 30: Navigable Waters, Harbors and Navigation

Chapter 32: Eminent Domain

Chapter 33: Public Inland Waters

Chapter 38: Technical College System

Chapter 40: Public Employee Trust Fund

Chapter 59: Counties

Chapter 60: Towns

Chapter 61: Villages

Chapter 62: Cities

Chapter 64: Other forms of city government

Chapter 66: General Municipality Law

Chapter 67: Municipal Borrowing and Municipal Bonds

Chapter 74: Property Tax Collection

Chapter 77: Taxation of forest croplands; real estate transfer fees; sales and use taxes; county and special district sales and use taxes; managed forest land; economic development surcharge; local food and beverage tax; local rental car tax; premier resort area taxes; state rental vehicle fee; dry cleaning fee

Chapter 86: Miscellaneous Highway Provisions

Chapter 92: Soil and Water Conservation and Animal Waste Management

Chapter 96: Agricultural Marketing Act

Chapter 111: Employment Relations

Chapter 115: State Superintendent; General Classifications and Definitions; Children with Disabilities

Chapter 117: School District Reorganization

Chapter 118: General School Operations

Chapter 119: First Class City School System

Chapter 120: School District Government

Chapter 121: School Finance

Chapter 196: Regulation of Public Utilities

Chapter 198: Municipal Power and Water Districts

Chapter 229: Public Institutions

Chapter 281: Water and Sewage

Chapter 565: State Lottery

Chapter 614: Insurance—Fraternal

Chapter 703: Condominiums

Chapter 707: Time-Share Ownership