



# Oregon

Tina Kotek, Governor

## Medical Board

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March 10, 2023

The Oregon Medical Board received an ORS 183.390 petition requesting amendment of OAR 847-080-0022, see attached petition.

The Oregon Medical Board will accept public comment upon the rule and requests public comment on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses.

**Written comments will be accepted until 5 p.m. on March 30, 2023, via email to [elizabeth.ross@omb.oregon.gov](mailto:elizabeth.ross@omb.oregon.gov).**

The Oregon Medical Board will review the petition and written comments at the Board meeting on April 6, 2023. Upon review, the Board may deny the petition or initiate rulemaking proceedings in accordance with ORS 183.335. If you have questions about this process, please contact Elizabeth Ross at [elizabeth.ross@omb.oregon.gov](mailto:elizabeth.ross@omb.oregon.gov).

Reasonable accommodations for people with disabilities are available upon request. Please contact Gretchen Kingham at [Gretchen.Kingham@omb.oregon.gov](mailto:Gretchen.Kingham@omb.oregon.gov) or call the Board at 971-673-2700 with your request.



Rec'd by OMB  
MAR 09 2023

March 3, 2023  
Oregon Medical Board  
1500 SW 1<sup>st</sup> Ave., Suite 620  
Portland, OR 97201-5847

Re: Request for Amendment of Rule  
OAR 847-080-0022

Dear Oregon Medical Board:

The American Board of Podiatric Medicine ("ABPM") submits the following petition pursuant to ORS 183.390 requesting that you amend OAR 847-080-0022 to remove the provision requiring certification by the American Board of Foot and Ankle Surgery ("ABFAS").

**1. Name and address of petitioner:**

The American Board of Podiatric Medicine  
1060 Aviation Blvd., Suite #100  
Hermosa Beach, CA 90254

**2. Name and address of any other person known to be interested in the rule:**

Oregon Podiatric Medical Association	American Board of Foot and Ankle Surgery
1581 NW John Fremont St., #1	445 Fillmore Street
Bend, OR 97703	San Francisco, CA 94117-3404

**3. Proposed amendment to OAR 847-080-0022:**

Ankle surgery must be conducted in a certified hospital or in an ambulatory surgical center certified by the Health Division. To be eligible to perform ankle surgery in the state of Oregon, the licensed podiatrist shall **have completed a surgical residency approved by the Council on Podiatric Medical Education (CPME).** ~~meet the qualifications from one of the following sections prior to being approved by the Board to perform ankle surgery:~~

~~(1) Completion of a Council on Podiatric Medical Education (CPME) approved surgical residency; board certification by the American Board of Foot and Ankle Surgery (ABFAS); documented clinical experience as approved by the Board; and current clinical privileges to perform reconstructive/rearfoot ankle surgery in a Joint Commission approved hospital; or~~  
~~(2) Completion of a CPME approved surgical residency; and board qualified by the ABFAS in Reconstructive Rearfoot/Ankle Surgery progressing to board certification in Reconstructive Rearfoot/Ankle Surgery within seven years.~~

**4. Reasons to amend OAR 847-080-0022:**

ABPM requests that the Oregon Medical Board amend OAR 847-080-0022 to remove the provision requiring certification by the American Board of Foot and Ankle Surgery ("ABFAS") for the following reasons.

First, removing board certification requirements for access to the full scope of practice for podiatrists creates comparable licensing standards in Oregon with 46 other states. Podiatric



education and training standards have advanced resulting in all podiatrists completing multi-year surgical residencies for the past 20 years. The proposed rule allows hospitals and surgery centers to consider a podiatrist's education, training, and experience for ankle surgery privileges and does not prohibit hospitals from creating their own certification requirements just as they may for MDs or DOs.

Second, identifying ABFAS as the only entity to provide certification for podiatrists to perform ankle surgery is both anti-competitive and an unlawful delegation of legislative authority. By designating one private entity as the sole decision-maker for deciding which podiatrists may provide ankle surgery in Oregon, the rule violates both state and federal antitrust laws.

The Oregon legislature delegated to the Oregon Medical Board the responsibility of identifying the podiatric physicians and surgeons who meet the qualifications to perform ankle surgery. *See* ORS 677.812(2). In turn, in adopting OAR 847-080-0022, Oregon Medical Board delegated that same responsibility to ABFAS. That delegation to ABFAS – a self-interested private entity – lacks any procedural safeguards to ensure that ABFAS is not arbitrarily denying certifications to podiatrists. Oregon appellate courts have invalidated rules in similar situations, *i.e.*, when government agencies delegate matters to private entities which have a self-interest in the decisions being made and when there are no procedural safeguards to prevent the private entities from making arbitrary decisions. *See Corvallis Lodge No. 1411 Loyal Order of Moose v. Oregon Liquor Control Com'n*, 67 Or App 15, 20, 677 P2d 76 (1984).

#### **5. Comments required by OAR 137-001-0070:**

- a. Options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses

The proposed rule amendment will not cause any negative economic impacts on business. If anything, the rule amendment will allow more qualified podiatrists to perform ankle surgery in the State of Oregon.

- b. The continued need for the existing rule

There is no continued need for the existing rule, as written.

- c. The complexity of the existing rule

The existing rule is not complex, but imposes an unnecessary and anticompetitive barrier to practice.

- d. The extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations

As noted above, the existing rule violates the Oregon Constitution because it unlawfully delegates legislative authority to a private, self-interested entity. It also violates state and federal antitrust laws.



- e. The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule

Since the rules initial adoption in 2000, technology, economic conditions, and regulations concerning podiatric medicine have changed. Podiatric education and training standards have advanced such that since 2003 all podiatrist now complete multi-year surgical residencies. For all the foregoing reasons, ABPM requests that the Oregon Medical Board amend OAR 847-080-0022. If the rule is not amended, ABPM is prepared to file a Petition for Judicial Review of Administrative Rule with the Oregon Court of Appeals and, if necessary, a complaint for antitrust violations in the United States District Court for the District of Oregon.

Sincerely,

A handwritten signature in black ink that reads "Lee Rogers". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Lee C. Rogers, DPM  
President, American Board of Podiatric Medicine

A handwritten signature in black ink that reads "Phillip E. Ward". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Phillip E. Ward, DPM  
Executive Director