

# ATF Interpretive Change Restricts Handgun Imports and May Require NFA Registration

October 23, 2020

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has recently changed the manner in which it interprets the statutory and regulatory definition of “handgun,” thereby further limiting the types of firearms eligible for importation. These determinations are not public, so it is difficult for the regulated community to assess and track shifting agency positions.

The Gun Control Act at 18 U.S.C. § 922(l) broadly prohibits the importation of all firearms into the United States. However, so long as a firearm is not military surplus nor subject to the National Firearms Act, section 925(d)(3) provides a limited exception for those firearms considered by ATF to be “generally recognized as particularly suitable for or readily adaptable to sporting purposes.” Over the past half century, ATF has issued several studies and criteria on how it evaluates whether shotguns, rifles, or handguns qualify as “sporting” under the law. The handgun factoring test is the most straightforward of these, with a point tally system that rewards larger and bulkier handguns. If a handgun receives 75 or more points, it is considered “sporting” and approved for importation. However, there is no ATF-issued “sporting purpose” test for a firearm that fails to fit within the definition of handgun, rifle, or shotgun. Accordingly, ATF has long held that such a firearm is not importable.

Despite ATF previously stating that there is no limit to how long or heavy a handgun should be to qualify as “sporting” under section 925(d)(3), ATF private classification letters issued within the past few months indicate that the agency has shifted course by reinterpreting what constitutes a “handgun.” In company-specific letters, ATF takes the position that if a submitted firearm is too long or too heavy, it fails to meet the definition of “handgun” under the Gun Control Act, as it is

## Authors

Megan L. Brown  
Partner

202.719.7579  
mbrown@wiley.law

Stephen J. Obermeier  
Partner

202.719.7465  
sobermeier@wiley.law

Jeremy J. Broggi  
Partner

202.719.3747  
jbroggi@wiley.law

Michael D. Faucette  
Partner

202.719.4587  
mfaucette@wiley.law

Boyd Garriott  
Associate  
202.719.4487  
bgarriott@wiley.law

## Practice Areas

International Trade

not “designed to be held and fired by the use of a single hand.” The Firearms and Ammunition Technology Division (FATD) of ATF—which conducts importability evaluations—says that it is taking a subjective approach to the statute by allowing individual examiners to determine if he or she can fire the weapon with one hand without difficulty.

This approach is resulting in inconsistent determinations, of which the regulated community should take note. Within the past few months, at least one HK91 pistol-style submission as light as 8 pounds, with a barrel length of 8-3/4 inches and an overall length of 21-3/4 inches, has been determined to fall outside the definition of “handgun.” This is a change from previous determinations where firearms weighing over 8 pounds, with 20-inch barrels, and an overall length of approximately 31-1/2 inches were held by FATD to be “handguns.” Since the letters are not publicly available, it is impossible for regulated companies to know the full range of FATD’s determinations. This has serious implications for regulated businesses.

In some of the new letters, ATF has begun listing the following “objective design features” when making its evaluations:

- Incorporation of rifle sights;
- Utilization of “rifle caliber ammunition” (both 5.56mm and 7.62mm have been considered as such);
- Incorporation of “rifle-length barrel;”<sup>1</sup>
- The “weapon’s heavy weight;”
- Ability to accept magazines that range in capacity from 20 rounds to 100 rounds, “which will contribute to the overall weight of the firearm”; and
- Overall length of the weapon which “creates a front-heavy imbalance when held in one hand.”

However, ATF also noted in the most recent private ruling that the above design features are “neither binding on future classifications nor is any factor individually determinative[.]” ATF explained without elaboration that “the statutory and regulatory definitions provide the appropriate standard in classifying the firearm.” ATF concluded that “a firearm that is too large, too heavy or . . . otherwise not designed to be held and fired in one hand (as demonstrated by the objective features) cannot be a handgun under the statutory definition and cannot be subject to importation criteria governing handguns.” In light of ATF’s subjective and inconsistent analysis of size and weight, it is difficult to predict how the agency will classify any given firearm under this standard.

### **Revocation of Existing Import Permits**

ATF acknowledged in one letter this month that certain firearms previously approved for importation and determined to be handguns “may wrongly have been approved for importation” and that “[s]uch firearms may require reevaluation.” Beyond that, ATF has not acknowledged a change in policy. Instead, it argued that “consideration of the objective design features of a firearm to determine the designed and/or intended use is clearly not a change in policy.” Although “ATF has not developed a definitive list of features that determine whether an item is a ‘pistol’ or ‘handgun[.]’” the non-public letters leave importers to consult the above-

mentioned list to assess whether their existing import permits may be revoked or whether new applications will be denied.

### **Consideration of Certain Handguns as Any Other Weapons (AOW)**

The new interpretation of the handgun definition could have additional significant effects on manufacturers and gun owners.

Under the National Firearms Act, a firearm that has an overall length of less than 26 inches and is neither a pistol, rifle nor shotgun is classified as an “Any Other Weapon” (AOW).<sup>2</sup> This means that if a firearm under 26 inches in overall length is determined not to be a pistol, rifle, or shotgun, it would necessarily be classified as an AOW.<sup>3</sup> AOWs require the payment of a tax and registration with the federal government.

Under ATF’s new reading of the definition, firearms previously classified as large-sized handguns by ATF may now require registration under the National Firearms Act as an AOW.<sup>4</sup> Possession of such a firearm without registration is punishable by up to ten years in prison. Since ATF has not articulated a standard, it is difficult to definitively know whether a large handgun is now an AOW because it may be deemed by the agency to be “too large, or too heavy” to fit within the statutory definition of handgun. The only definitive way to know is to submit the firearm to ATF for evaluation, a process that can take over a year.

### **Interim Final Rule on Improper Agency Guidance**

ATF reportedly believes that its new analysis is the only way to conduct evaluations in light of the Department of Justice’s (DOJ) Interim Final Rule on Improper Agency Guidance (IFR)—a procedural rule designed to increase regulatory transparency. That position appears to run contrary to the purpose of the IFR and so far, the agency has not put it in writing. Further, one ATF private letter from this month attempts to shield itself from DOJ’s IFR by indicating that the letter is “not a final classification of the firearm and is not final agency action.” It goes on to say, “if you submit an ATF Form 6 for the importation of the subject firearm, ATF will take appropriate action.” It appears that ATF is saying that the letter is not final agency action until a Form 6 is formally rejected. But given that this firearm was already evaluated pursuant to an ATF Form 6 application, it is unclear what additional steps are available to make this letter final agency action.

\* \* \*

Under ATF’s new interpretation of the handgun definition, millions of AR-15 style pistols could be considered “too large, or too heavy” to fall within ATF’s new interpretation, thereby making them unregistered NFA weapons, and subjecting manufacturers and gun owners to criminal prosecution. Given the private nature of ATF’s classification rulings, and the subjective nature of the analysis, it is extremely difficult to know for sure whether specific firearms fall within the new interpretation. This appears to be part of a continuing trend at ATF to apply firearms statutes in a more restrictive manner without informing the public—a trend that appears unaffected by the IFR. In this uncertain regulatory environment, importers and manufacturers should consult counsel before making significant purchasing, importing, or manufacturing decisions for firearms that could be implicated by ATF’s heretofore unknown and undisclosed analysis.

[1] It is unclear what constitutes a "rifle-length barrel" or "rifle caliber ammunition."

[2] See 26 U.S.C. § 5845(e).

[3] This firm is aware of two FATD determinations where the submitted firearms were determined neither to be pistols (because they were too large or too heavy) nor AOWs (because their overall length exceeded 26 inches). A third FATD determination was issued for a firearm considered too large or too heavy to be a handgun and under 26 inches in overall length. However, unlike the first two letters, this determination did not mention the AOW statute.

[4] Note that while the GCA definition of "handgun" is worded differently from the NFA definition of "pistol," the core elements are the same.