

The Nine Filing Categories of Form 5471 Filers

Form 5471, Item B

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The 2023-2024 Form 5471 Series
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The 2023-2024 Form 5471 Series

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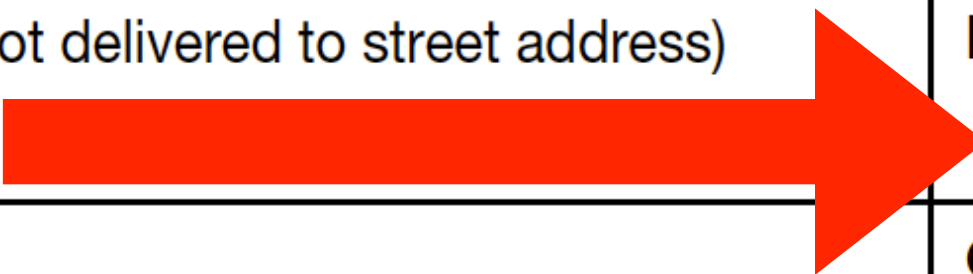
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1. Introduction

All this time spent talking about one line in Form 5471

<p>Form 5471 (Rev. December 2022) Department of the Treasury Internal Revenue Service</p>	<p align="center">Information Return of U.S. Persons With Respect to Certain Foreign Corporations</p> <p align="center">Go to www.irs.gov/Form5471 for instructions and the latest information.</p> <p>Information furnished for the foreign corporation's annual accounting period (tax year required by section 898) (see instructions) beginning _____, 20____, and ending _____, 20____</p>	<p>OMB No. 1545-0123</p> <hr/> <p>Attachment Sequence No. 121</p>
<p>Name of person filing this return</p>	<p>A Identifying number</p>	
<p>Number, street, and room or suite no. (or P.O. box number if mail is not delivered to street address)</p>	<p>B Category of filer (See instructions. Check applicable box(es).): 1a <input type="checkbox"/> 1b <input type="checkbox"/> 1c <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5a <input type="checkbox"/> 5b <input type="checkbox"/> 5c <input type="checkbox"/></p>	
<p>City or town, state, and ZIP code</p>	<p>C Enter the total percentage of the foreign corporation's voting stock you owned at the end of its annual accounting period _____ %</p>	



The boxes you check will create your workload

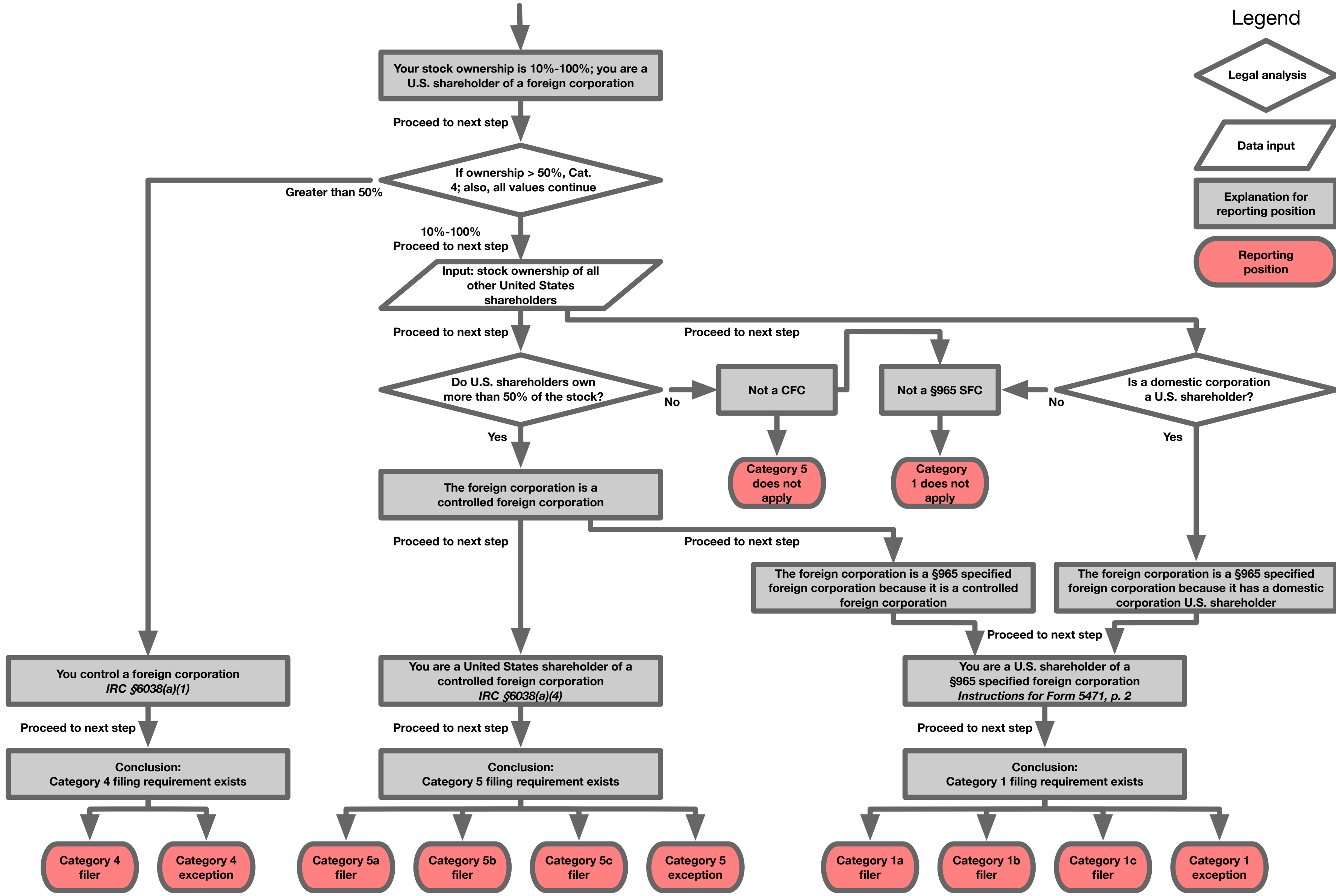
- *Instructions for Form 5471* (rev. 01-2023), p. 5.
- This is not the full table! There are more rows below this excerpt.
- Form 5471 penalties are big, so mistakes are expensive. You don't want to accidentally miss a required schedule.

Required Information*	Category of Filer								
	1a	1b	1c	2	3	4	5a	5b	5c
The identifying information on page 1 of Form 5471 above Schedule A; see Specific Instructions	✓	✓	✓	✓	✓	✓	✓	✓	✓
Schedule A					✓	✓			
Schedule B, Part I					✓	✓			
Schedule B, Part II	✓		✓		✓	✓	✓		✓
Schedules C and F					✓	✓			
Separate Schedule E	✓	✓ ₁	✓ ₂			✓	✓	✓ ₁	✓ ₂
Schedule E-1 (included with separate Schedule E)	✓	✓ ₁				✓	✓	✓ ₁	
Schedule G			✓		✓	✓	✓		✓
Separate Schedule H						✓	✓		
Schedule I						✓	✓	✓	
Separate Schedule I-1						✓	✓	✓	✓

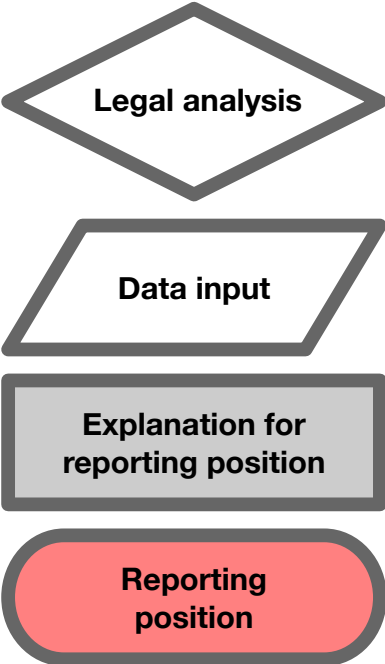
There are two sets of filing categories

- **Ownership-triggered** — you must file Form 5471 because you own enough stock of a foreign corporation.
 - Categories 1a/1b/1c, 4, and 5a/5b/5c.
- **Event-triggered** — you must file Form 5471 because the right type of event (acquisition or disposition of stock, corporate reorganization, and other events) happened.
 - Categories 2, 3.

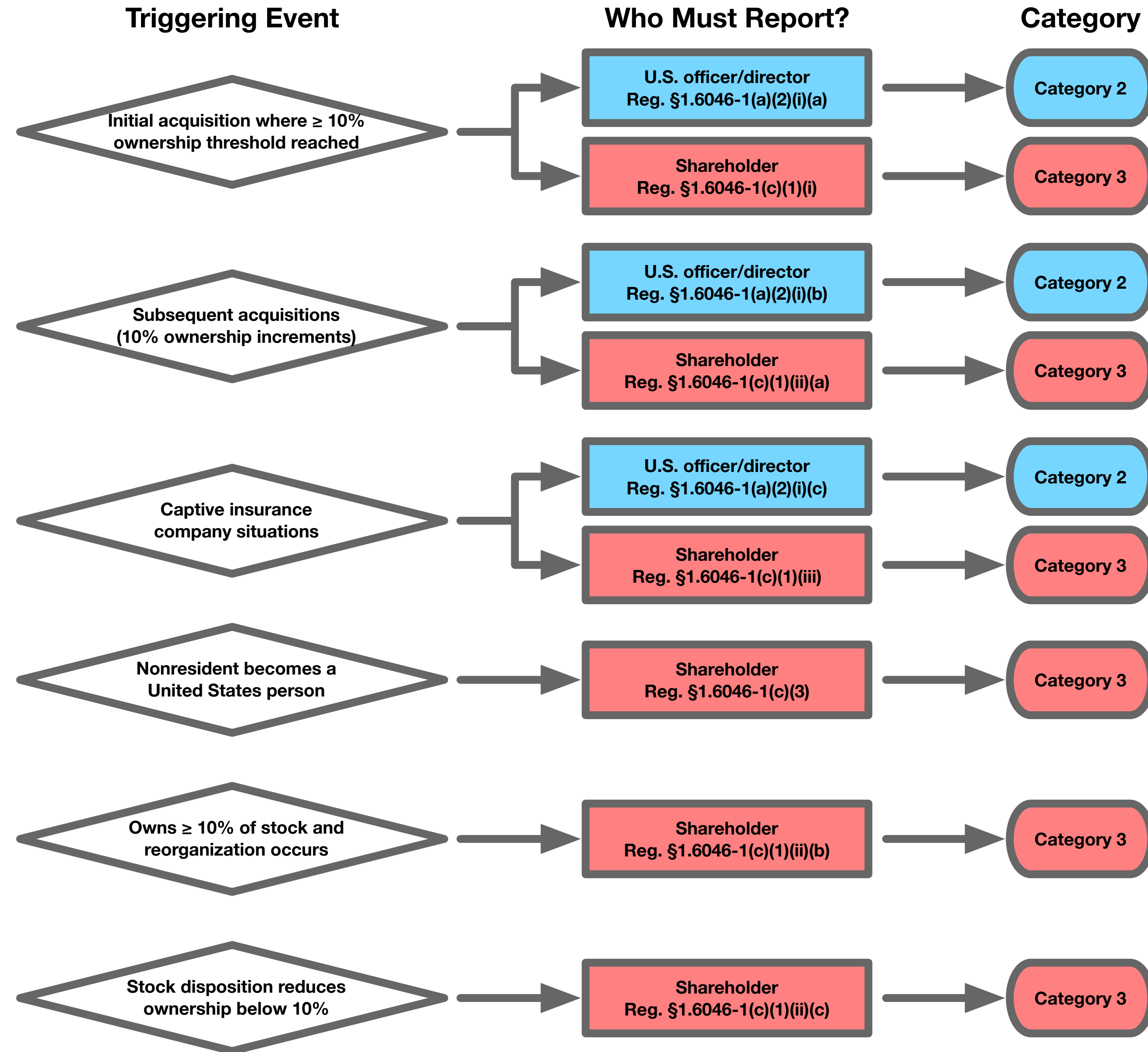
The Ownership-Triggered Filing Categories: 1, 4, and 5



Legend

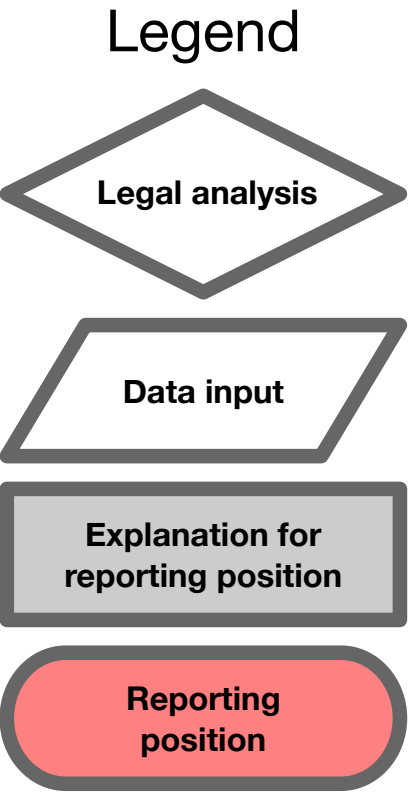
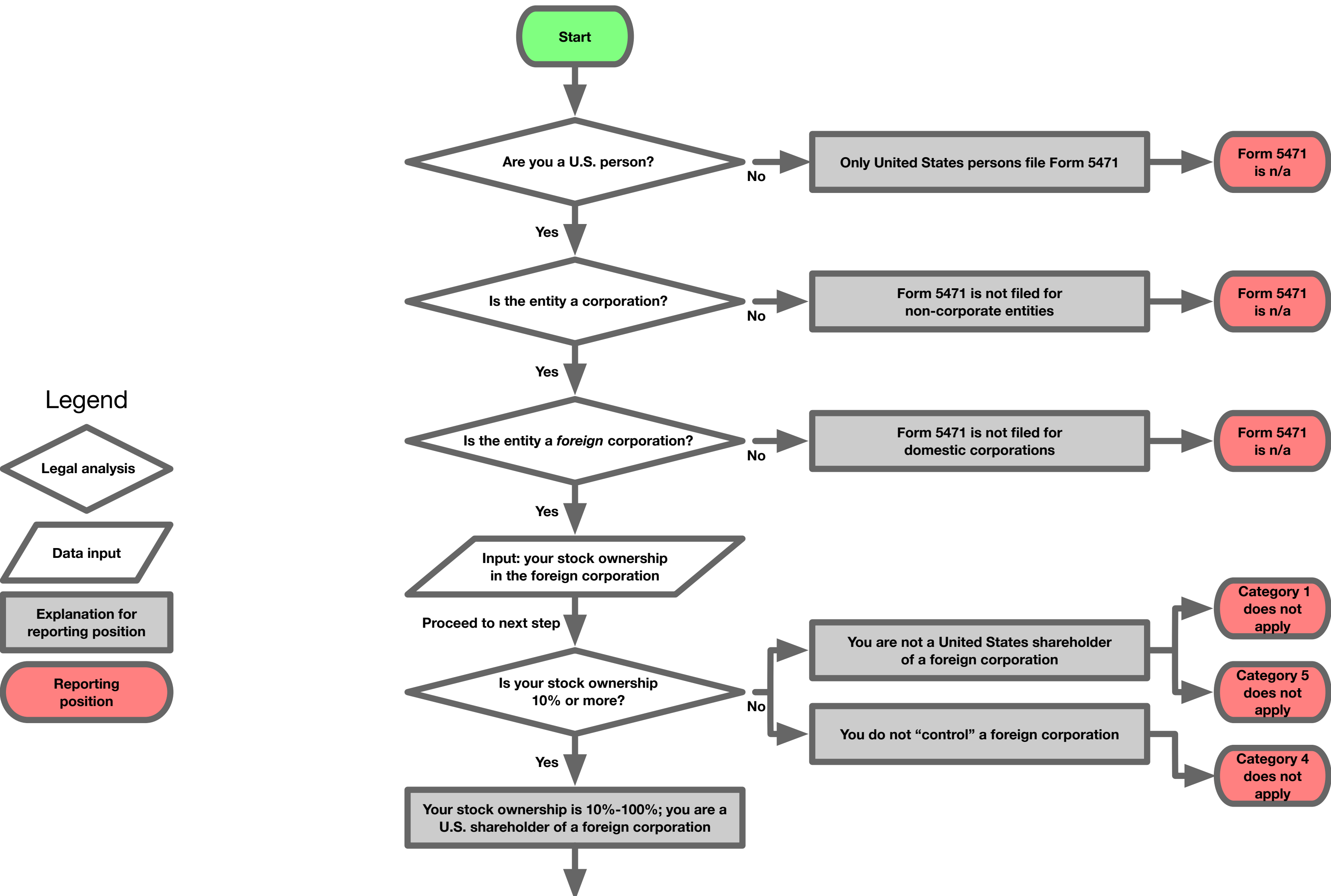


The Event-Triggered Filing Categories: 2, 3



2. Elements Common to All of the Categories

Common Elements to the Ownership-Triggered Categories



U.S. person (standard definition; there are variations by Category)

IRC §7701(a)(30) Definition	Authority
U.S. citizen individual	IRC §7701(a)(30)(A)
Resident alien individual	IRC §7701(a)(30)(A)
Domestic partnership	IRC §7701(a)(30)(B)
Domestic corporation	IRC §7701(a)(30)(C)
Domestic estate	IRC §7701(a)(30)(D)
Domestic trust	IRC §7701(a)(30)(E)

Is it a foreign **corporation**?

- Use the entity classification regulations at Regs. §301.7701-2(b)(8) for a list of entity types (by country) that are always classified as corporations for U.S. tax purposes.
- Use the entity classification regulations at Regs. §301.7701-3(b)(2) for how to classify foreign entities that are not on the “always classified as corporations” list at Regs. §301.7701-2(b)(8).
- Don’t figure it out by interpreting the type of letters at the end of the name. “Ltd.”, “S.A.”, “Inc.”, “LLC”, etc. will not give you the definitive classification of an entity for U.S. tax purposes.

Weird entities: foundations (what are they? what does the IRS think?)

- These are native to countries that do not have a historic connection to the British Empire. Typical names: anstalt, stiftung, stichting, foundation. They superficially look a lot like corporations, but usually (in my experience) behave like trusts.
- The IRS does not have a firm conviction about the classification of these entities. They could be classified as trusts or corporations. See AM 2009-012 - <https://www.irs.gov/pub/irs-utl/am2009012.pdf>
- Generally, behavior-driven: passive, asset-holding behavior makes it look like a trust, while active, business-like behavior makes it look like an association taxable as a corporation.

Is this a **foreign** corporation?

- **Foreign**—The term “foreign” when applied to a corporation or partnership means a corporation or partnership which is not domestic. IRC §7701(a)(5).
- **Domestic**—The term “domestic” when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations. IRC §7701(a)(4).
- **United States**—The term “United States” when used in a geographical sense includes only the States and the District of Columbia. IRC §7701(a)(9).
- **State**—The term “State” shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title. IRC §7701(a)(10).

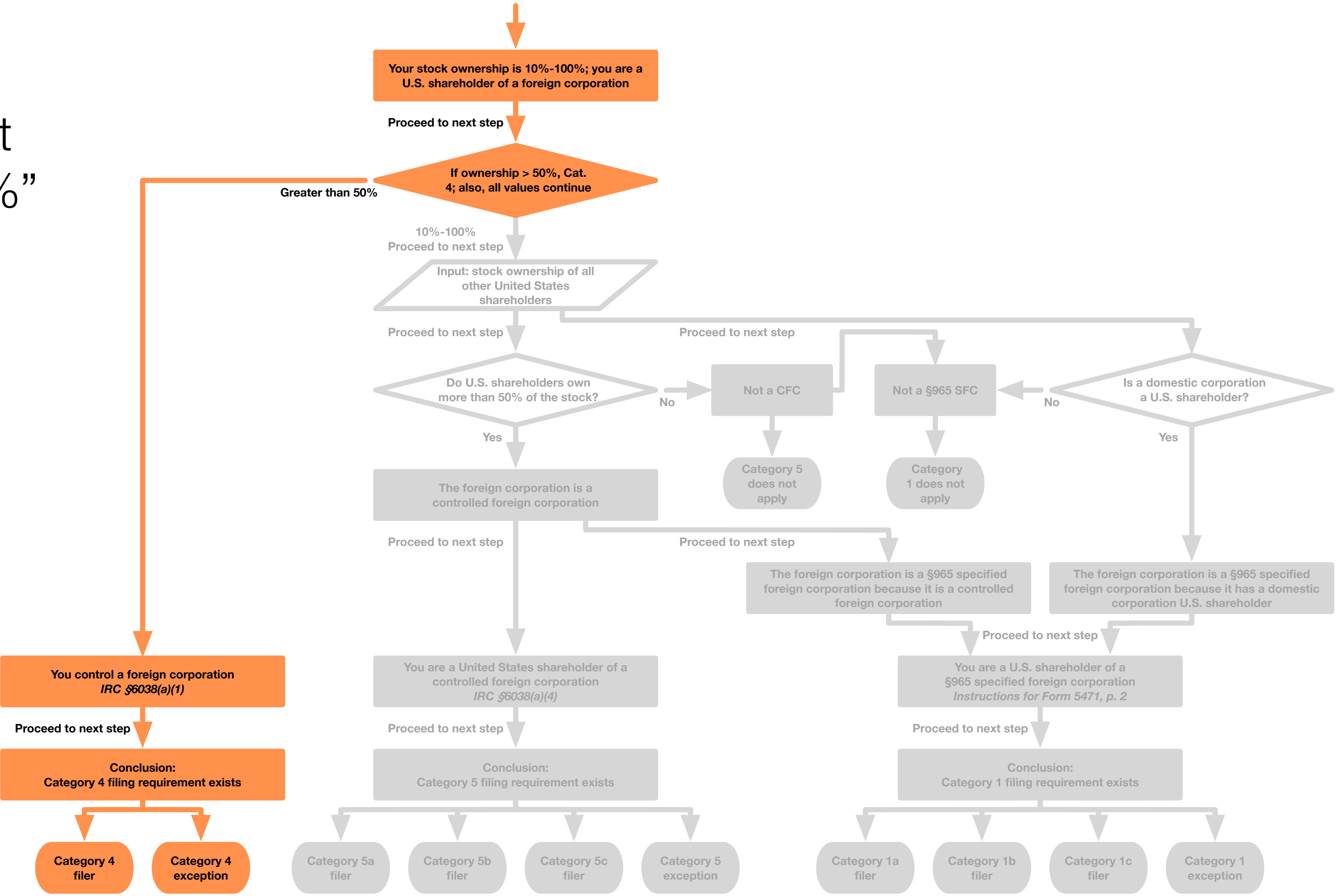
How much stock do you own?

- Figure out how much stock you own in the foreign corporation, using the appropriate attribution rules for indirect and constructive ownership (Category 4 has slightly different rules from Categories 1, 5).
- We covered a lot of this in Episode 2 when we talked about attribution rules.

3. The Ownership-Triggered Categories: Category 4

Category 4

- Easy: it's all about "greater than 50%" stock ownership.



Who is a Category 4 filer?

- A “**U.S. person**” (*mostly* figured out when you decided you’re preparing a domestic income tax return, but there are modifications to the standard definition of “U.S. person” we have to consider for Category 4 purposes.)
- Who “**controls**” (figured out when you figured out stock ownership.)
- A “**foreign corporation**” (already done.)
 - IRC §6038(a)(1).

Definition of United States person (as modified for Category 4)

This is a Category 4 “United States Person”	Authority; Modifications to IRC §7701(a)(30) Highlighted
United States citizen	Regs. §1.6038-2(d)(1)
Resident alien	Regs. §1.6038-2(d)(1)
Domestic partnership	Regs. §1.6038-2(d)(1)
Domestic corporation	Regs. §1.6038-2(d)(1)
Domestic estate	Regs. §1.6038-2(d)(1)
Domestic trust	Regs. §1.6038-2(d)(1)
Bona fide Puerto Rico resident	Regs. §1.6038-2(d)(2)(i)
Bona fide possessions resident	Regs. §1.6038-2(d)(2)(ii)
Nonresident alien with IRC §6013(g), (h) election	Regs. §1.6038-2(d)(3)

How much stock do you need to control a foreign corporation?

“A person shall be deemed to be in control of a foreign corporation if at any time during that person's taxable year it **owns stock possessing more than 50 percent** of the total combined voting power of all classes of stock entitled to **vote**, or more than 50 percent of the total **value** of shares of all classes of stock of the foreign corporation. * * * *”

Regs. §1.6038-2(b). *Emphasis added.*

- Apply the standard constructive ownership rules of IRC §318(a), with the modifications listed at Regs. §1.6038-2(c).

When must you have control of a foreign corporation?

“A person shall be deemed to be in control of a foreign corporation **if at any time during that person's taxable year** it owns stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the total value of shares of all classes of stock of the foreign corporation. * * * *”

Regs. §1.6038-2(b). *Emphasis added.*

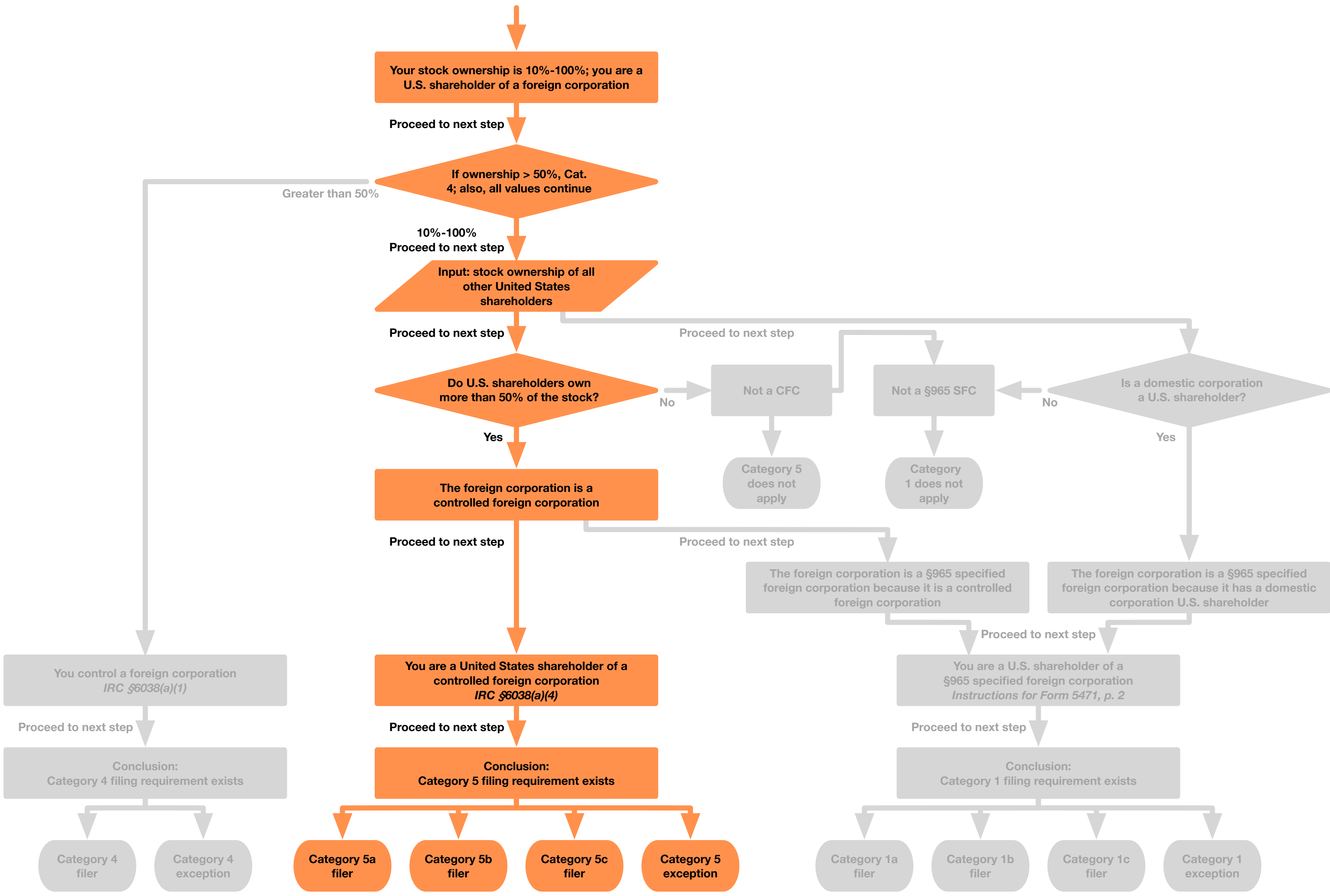
Category 4 — Summary

- “U.S. person” is more broadly defined than the standard definition, but the exceptions are easy to identify.
- “Foreign corporation” uses the standard definition. You won’t be confused.
- “Control” (meaning “you own enough stock at any time during the tax year”) is the crux of the Category 4 analysis. And that was entirely answered by your “how much stock does this person own?” archeology expedition, wasn’t it?

4. The Ownership-Triggered Categories: Category 5

Category 5

- “United States shareholder of a controlled foreign corporation”
- IRC §6038(a)(4).



Controlled foreign corporation defined: IRC §957(a)

- (a) *General rule.* For purposes of this title, the term “controlled foreign corporation” means any foreign corporation if **more than 50 percent** of—
- (1) the total combined **voting power** of all classes of stock of such corporation entitled to vote, or
 - (2) the total **value** of the stock of such corporation,
- is owned (within the meaning of section 958(a)), or is considered as owned by applying the rules of ownership of section 958(b), by United States shareholders on any day during the taxable year of such foreign corporation.

United States shareholder

“For purposes of this title, the term “United States shareholder” means, with respect to any foreign corporation, a **United States person** (as defined in section 957(c)) who owns (within the meaning of section 958(a)), or is considered as owning by applying the rules of ownership of section 958(b), **10 percent or more** of the total combined **voting power** of all classes of stock entitled to vote of such foreign corporation, or 10 percent or more of the total **value** of shares of all classes of stock of such foreign corporation.”

IRC §951(b). *Emphasis added.*

How much stock must you own to be a United States shareholder?

- **10%** or more of the foreign corporation's stock.
- “Own” is determined by applying IRC §958(a) and IRC §958(b) rules.
- That is definition of “United States shareholder” in IRC §951(b).

Category 5 Filers

In general, a Category 5 filer is a person who was a U.S. shareholder that owned stock in a foreign corporation that was a CFC at any time during the foreign corporation's tax year ending with or within the U.S. shareholder's tax year, and who owned that stock on the last day in that year in which the foreign corporation was a CFC. There are three different types of Category 5 filers, each described below: Category 5a filers, Category 5b filers, and Category 5c filers.

When must you own stock?

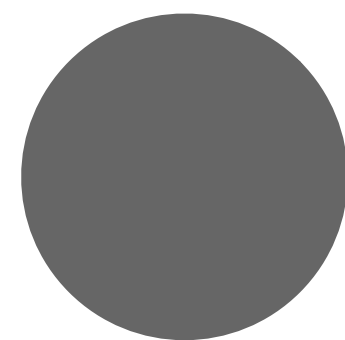
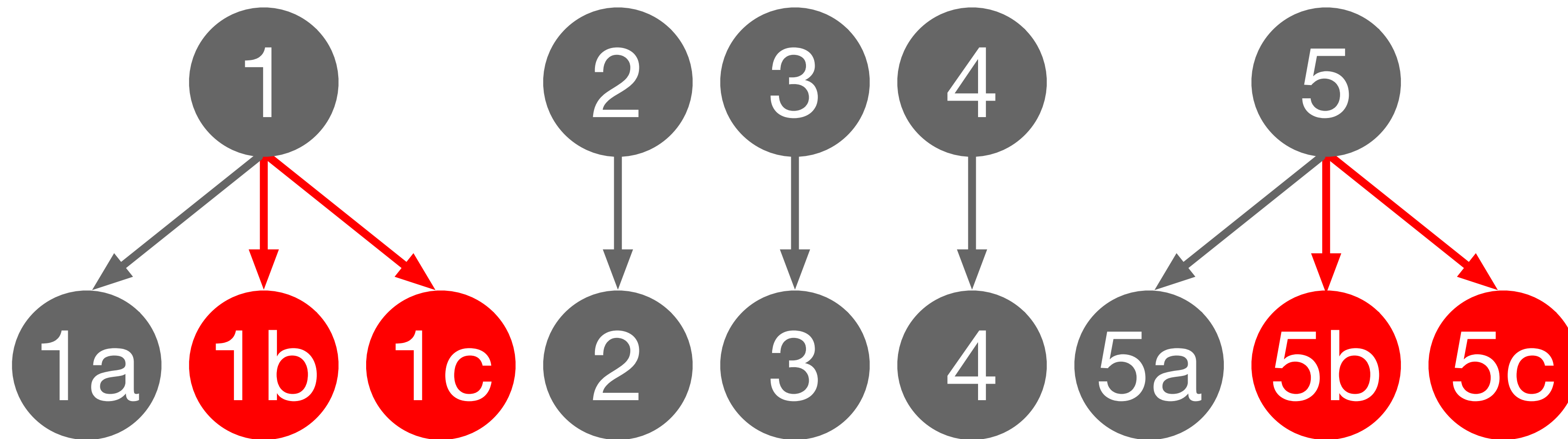
- Own **10%** or more of the foreign corporation's stock at **ANY TIME** during the foreign corporation's tax year, AND
- Own **"THAT"** stock on the **LAST DAY** of the year in which the foreign corporation was a CFC.
- What does **"that"** stock mean? Let's leave the question for another day, as a cliffhanger to intrigue and irritate you. 😈

Category 5 Filers

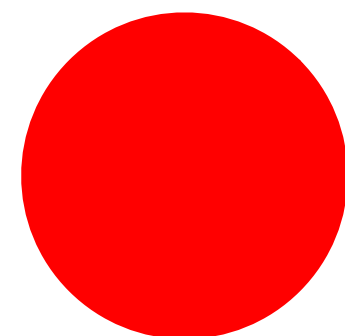
In general, a Category 5 filer is a person who was a U.S. shareholder that owned stock in a foreign corporation that was a CFC at any time during the foreign corporation's tax year ending with or within the U.S. shareholder's tax year, and who owned that stock on the last day in that year in which the foreign corporation was a CFC. There are three different types of Category 5 filers, each described below: Category 5a filers, Category 5b filers, and Category 5c filers.

Category 5 —> 5a, 5b, or 5c (will be covered in Episode 4)

From Five to Nine Filing Categories



No change.



New. Repeal of IRC §958(b)(4), the curse of downward attribution, and the impact of Rev. Proc. 2019-40.

You're Category 5. But what KIND of Category 5?

- Category 5 filer status is determined by being a “United States shareholder” of a “controlled foreign corporation,” but what flavor of Category 5 filer are you?
- Downward attribution (after the Tax Cuts and Jobs Act) from foreign persons can create unintended United States shareholders and unintended controlled foreign corporations. It may be difficult to gather the information needed for Category 5 filing requirements.
- Rev. Proc. 2019-40 sliced Category 5 into Categories 5a, 5b, and 5c, with reduced reporting requirements for Categories 5b and 5c. This will be covered in Episode 4.

TJCA-caused problem: Is this a CFC?

“In certain circumstances, **as a result of the repeal of section 958(b)(4)**, a U.S. shareholder with respect to a foreign corporation may not be able to determine that the foreign corporation is a CFC without knowledge regarding the investments of unrelated persons. In such a case, the Treasury Department and the IRS recognize that **it may not be possible for the U.S. shareholder to obtain information necessary to determine whether the foreign corporation is a CFC.**”

Rev. Proc. 2019-40, Section 4.02. *Emphasis added.*

TJCA-caused problem: Do you have includable gross income?

“The Treasury Department and the IRS are aware that, **in certain circumstances, taxpayers are required to include in gross income** amounts under sections 951 ("subpart F inclusion amounts") and 951A ("GILTI inclusion amounts") attributable to, and report amounts with respect to, foreign corporations that are CFCs **solely because of the repeal of section 958(b)(4)**, even though those taxpayers may have **limited ability to determine whether such foreign corporations are CFCs and to obtain the information necessary to accurately determine these amounts.**”

Rev. Proc. 2019-40, Section 2. *Emphasis added.*

Categories 1 and 5 after Rev. Proc. 2019-40

	Has direct or indirect stock ownership (IRC §958(a)) in the foreign-controlled CFC or SFC	Only has constructive ownership through a foreign person via IRC §318(a)(3) in the foreign-controlled CFC or SFC
Related to the foreign-controlled CFC or SFC	Categories 1a, 5a (These are the “catch-all” categories for a Category 1 or 5 filer who does not fit in 1b/5b or 1c/5c)	“Related Constructive U.S. Shareholder” Categories 1c, 5c Rev. Proc. 2019-40, §8.03.
Unrelated to the foreign-controlled CFC or SFC	“Unrelated IRC §958(a) U.S. Shareholder” Categories 1b, 5b Rev. Proc. 2019-40, §8.02.	No Form 5471 filing requirement. Rev. Proc. 2019-40, §8.04; <i>Instructions for Form 5471 (rev. 01-2023)</i>, page 6.

What does “foreign-controlled” CFC (or SFC) mean?

- Apply IRC §318(a)(3) attribution rules two ways: **with** attribution from foreign persons to U.S. persons, and **without** attribution from foreign persons to U.S. persons.
- **If** the corporation is a CFC (or SFC) when you have attribution from foreign persons to U.S. persons, **and** NOT a CFC (or SFC) when you have prohibit attribution from foreign persons to a U.S. person,
- **Then** it is a foreign-controlled CFC (or SFC). Rev. Proc. §2019-40, §3.09.

What does “related” mean?

- Are you “related” to any particular person/entity in this Form 5471 problem so you know whether you fit into Category 5b or 5c? Here’s how to figure it out.
- Go to IRC §954(d)(3). Everywhere you see the phrase “controlled foreign corporation” delete it, and insert the name of the person you’re trying to figure out whether your related to: the foreign-controlled CFC.
- Does IRC §954(d)(3) say you’re related to the foreign-controlled CFC? You’re “related” as far as Rev. Proc. 2019-40 is concerned. Rev. Proc. 2019-40, Section 3.06.

5. The Ownership-Triggered Categories: Category 1

Category 1: who must file, generally

- U.S. shareholders of “section 965 specified foreign corporations.” See the definition of “specified foreign corporation” at IRC §965(e)(1).
- (Not to be confused with “specified foreign corporation” as the term is defined in IRC §898(b), having to do with the taxable year of some foreign corporations).

Category 1 Filers

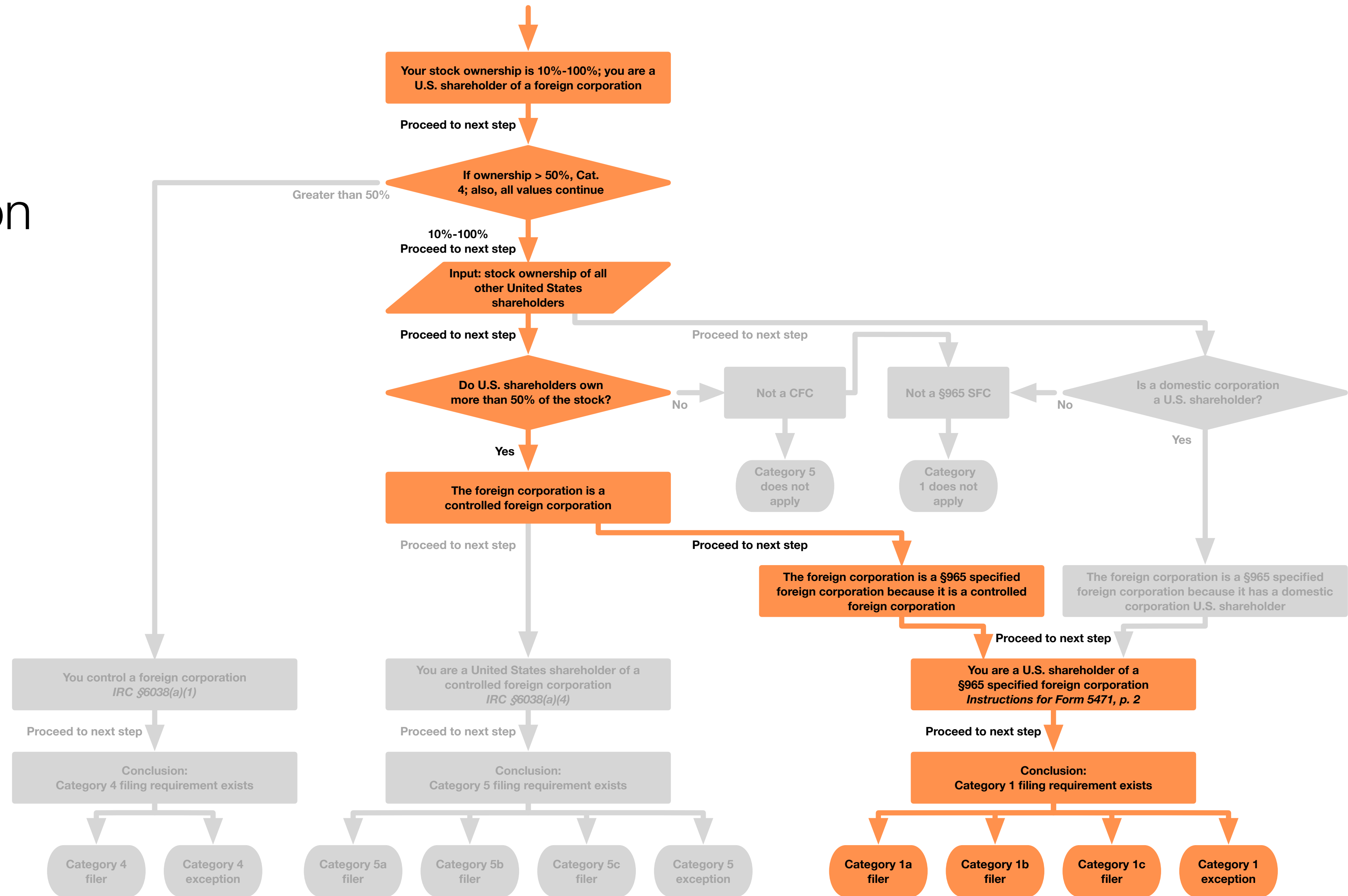
These categories include a U.S. shareholder of a foreign corporation that is a section 965 specified foreign corporation (SFC) (defined below) at any time during any tax year of the foreign corporation, and who owned that stock on the last day in that year on which it was an SFC, taking into account the regulations under section 965. However, see [*Certain Category 1 and Category 5 Filers*](#), later, which may apply.

Definition: specified foreign corporation

- A controlled foreign corporation (IRC §965(e)(1)(A)); or
- Any foreign corporation in which a domestic corporation is a United States shareholder. IRC §965(e)(1)(B).

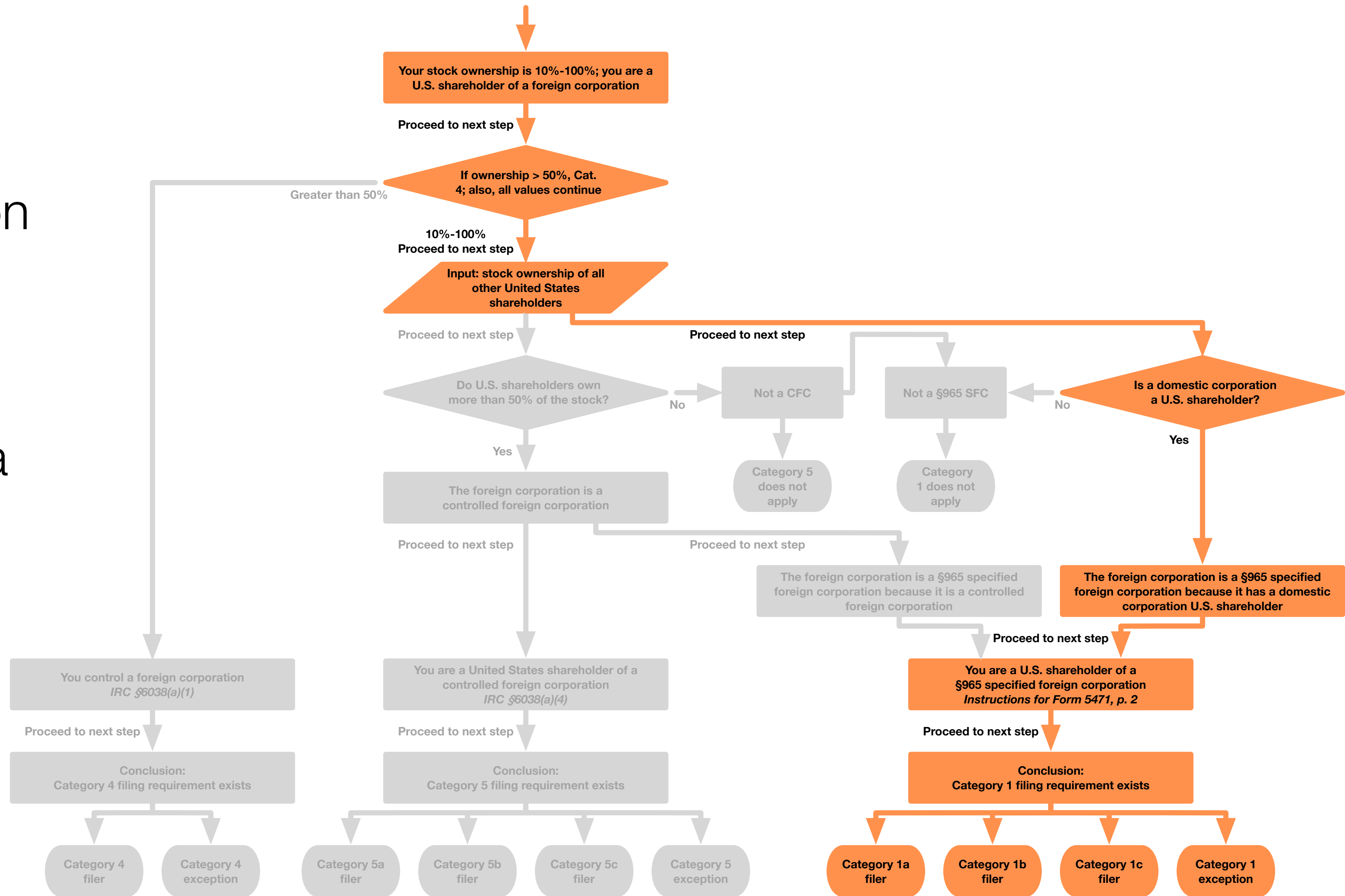
Category 1

- “United States shareholder of a section 965 specified foreign corporation”.
- Method: **CFC** is a “specified foreign corporation”.



Category 1

- “United States shareholder of a section 965 specified foreign corporation”.
- Method: **non-CFC** is a “specified foreign corporation” if it has a domestic corporation as a United States shareholder.



You're Category 1. But what KIND of Category 1?

- Category 1 filer status is determined by being a “United States shareholder” of a “specified foreign corporation,” but what flavor of Category 1 filer are you?
- Downward attribution (after the Tax Cuts and Jobs Act) from foreign persons can create unintended United States shareholders and unintended controlled foreign corporations. It may be difficult to gather the information needed for Category 1 filing requirements.
- Rev. Proc. 2019-40 applies to Category 1 in the same way that it applies to Category 5. This will be covered in depth in Episode 4.

The exception that swallows the rule

- A U.S. shareholder who is a Category 1 filer must continue to file all of the Schedules required for that Category as long as:
 - The specified foreign corporation has accumulated E & P related to IRC §965 that is reportable on Schedule J (Form 5471), or
 - The U.S. shareholder has previously taxed E & P related to IRC §965 that is reportable on Schedule P (Form 5471).

Categories 1 and 5 after Rev. Proc. 2019-40

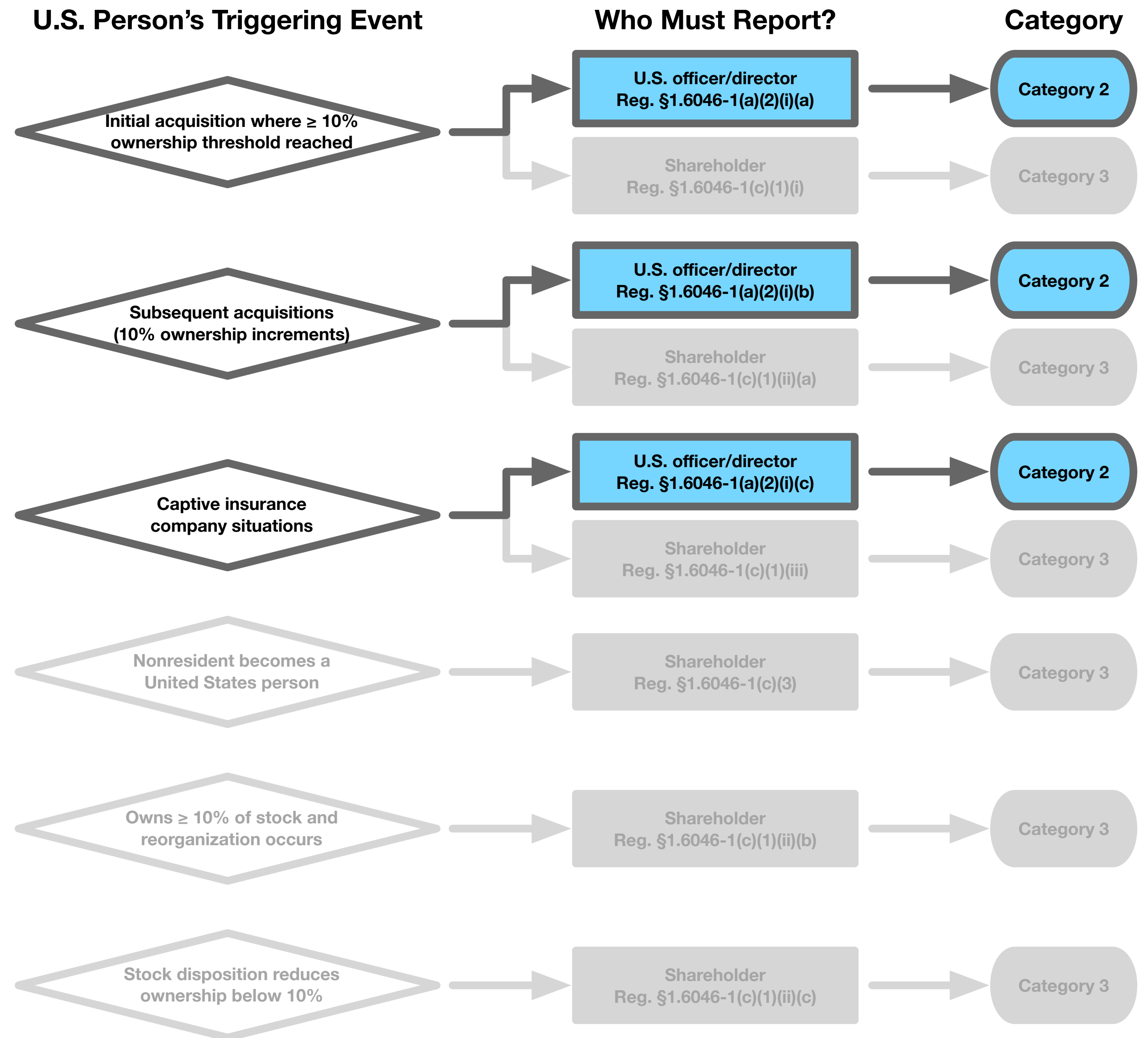
	Has direct or indirect stock ownership (IRC §958(a)) in the foreign-controlled CFC or SFC	Only has constructive ownership (IRC §951(b)) from a foreign person in the foreign-controlled CFC or SFC
Related to the foreign-controlled CFC or SFC	<p>Categories 1a, 5a</p> <p>(Category 1 or 5 filer who does not fit in 1b/5b or 1c/5c)</p>	<p>Categories 1c, 5c</p> <p>“Related Constructive U.S. Shareholder” Rev. Proc. 2019-40, §8.03.</p>
Unrelated to the foreign-controlled CFC or SFC	<p>Categories 1b, 5b</p> <p>“Unrelated IRC §958(a) U.S. Shareholder” Rev. Proc. 2019-40, §8.02.</p>	<p>No Form 5471 filing requirement</p> <p>Rev. Proc. 2019-40, §8.04; <i>Instructions for Form 5471 (rev. 01-2023)</i>, page 6.</p>

6. The Event-Triggered Filing Categories: Category 2

Category 2 Triggering Events

- A U.S. person who is an officer/director of a foreign corporation is a Category 2 filer for:
- Stock acquisitions (of the right size) by any U.S. person. Regs. §1.6046-1(a)(2)(i)(a), (b).
- Captive insurance company situations. Regs. §1.6046-1(a)(2)(i)(c).

The Event-Triggered Filing Requirements: Category 2



Officers and directors are Category 2 filers

- **U.S. citizens or residents** who are officers or directors of foreign corporations.
- They must file Form 5471 as a Category 2 filer when a **U.S. person acquires** stock of that foreign corporation in specified percentage trigger amounts.
- They do not file Form 5471 as a Category 2 filer when a U.S. person disposes of stock in the foreign corporation.
- Category 2 filing requirements apply to **any** foreign corporation, not just controlled foreign corporations.
- Regs. §1.6046-1(a)(2)(i).

What makes you an “officer or director”?

- No answer anywhere that I know about.
- “Persons who would qualify by the nature of their functions and ownership in such associations, etc., as officers, directors, or shareholders thereof will be treated as such for purposes of this section without regard to their designations under local law.” Regs. §1.6046-1(d).
 - What about an “Deputy-Assistant-Vice-Under-Administrative-Associate-Adjunct-Treasurer-For-Minor-Functionary-Purposes, Second Class, With Power to Staple Pieces of Paper Together Only”? Is that person an “officer”?

This type of U.S. person's event triggers Category 2 filing requirement

This is a Category 2, 3 "United States Person"	Authority; Modifications to IRC §7701(a)(30) Highlighted
U.S. citizen	Regs. §1.6046-1(f)(3)(i)
Resident alien	Regs. §1.6046-1(f)(3)(i)
Domestic partnership	Regs. §1.6046-1(f)(3)(i)
Domestic corporation	Regs. §1.6046-1(f)(3)(i)
Domestic estate	Regs. §1.6046-1(f)(3)(i)
Domestic trust	Regs. §1.6046-1(f)(3)(i)
Bona fide Puerto Rico resident	Regs. §1.6046-1(f)(3)(ii)(A)
Bona fide possessions resident	Regs. §1.6046-1(f)(3)(ii)(B)
Nonresident alien with IRC §6013(g), (h) election	Regs. §1.6046-1(f)(3)(iii)

7. The Event-Triggered Filing Categories: Category 3

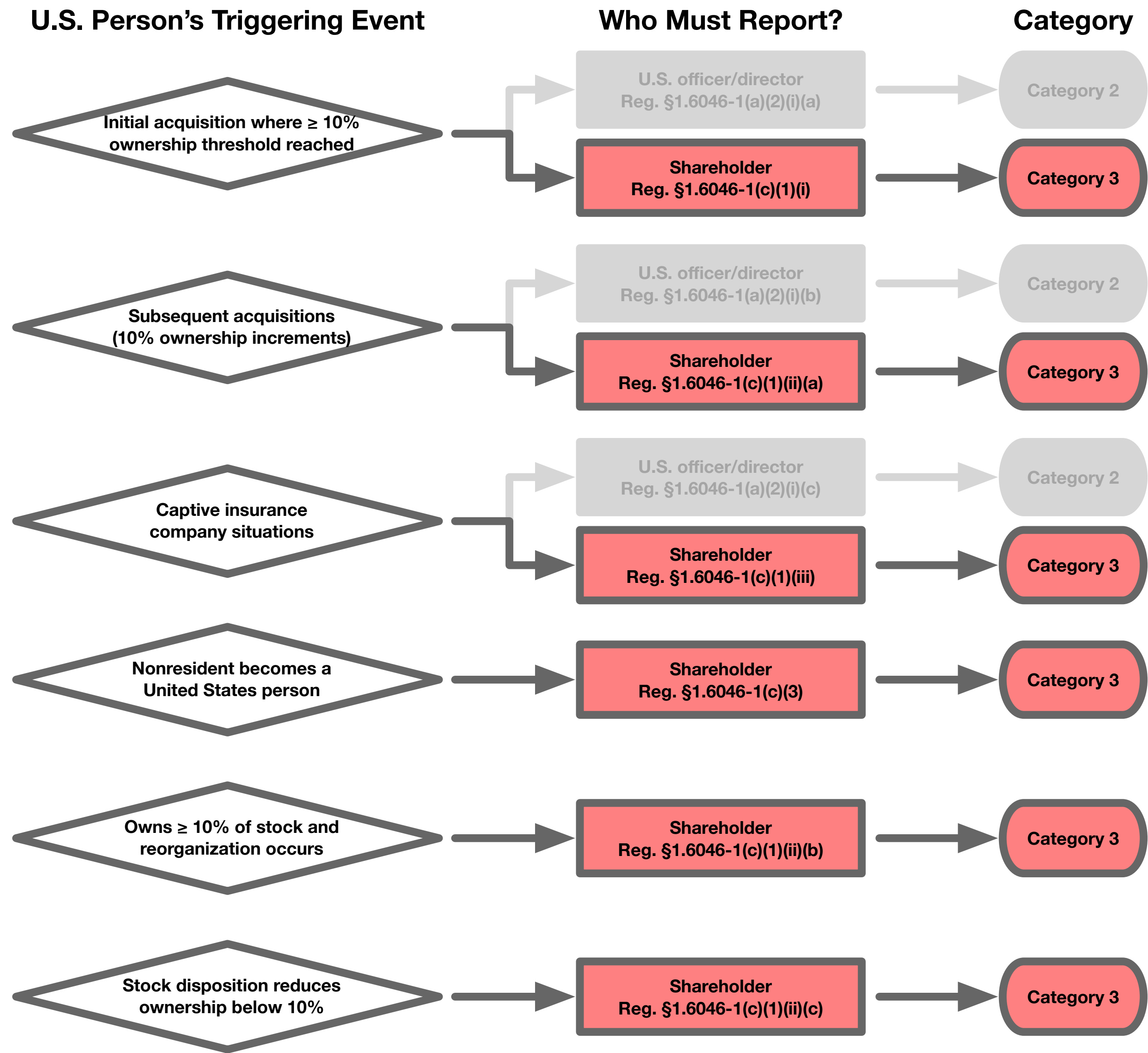
Who is a Category 3 filer?

- A U.S person (modified definition)
- An event occurs or a situation exists
 - Acquisition of (enough) foreign corporation stock
 - Disposition of (enough) foreign corporation stock
 - There is a reorganization of the foreign corporation
 - Nonresident alien becomes a resident alien

This type of U.S. person's event triggers Category 3 filing requirement

This is a Category 2, 3 "United States Person"	Authority; Modifications to IRC §7701(a)(30) Highlighted
U.S. citizen	Regs. §1.6046-1(f)(3)(i)
Resident alien	Regs. §1.6046-1(f)(3)(i)
Domestic partnership	Regs. §1.6046-1(f)(3)(i)
Domestic corporation	Regs. §1.6046-1(f)(3)(i)
Domestic estate	Regs. §1.6046-1(f)(3)(i)
Domestic trust	Regs. §1.6046-1(f)(3)(i)
Bona fide Puerto Rico resident	Regs. §1.6046-1(f)(3)(ii)(A)
Bona fide possessions resident	Regs. §1.6046-1(f)(3)(ii)(B)
Nonresident alien with IRC §6013(g), (h) election	Regs. §1.6046-1(f)(3)(iii)

The Events that Trigger Category 3 Filing



Events that might not be so obvious but will trigger a filing requirement

- Nonresident alien family members: constructive ownership rules mean their acquisitions/dispositions are your acquisitions/dispositions.
- A check-the-box election is a disposition of all stock.
- Nonresident alien to resident alien status when you already own 10% or more.
- U.S. person marries a nonresident alien. Constructive ownership rules: you didn't own stock on the day before marriage. On the day after marriage you own your nonresident alien spouse's stock. Did you "acquire" that stock on the date of marriage?
- Reorganizations, stock redemptions, etc.

8. Conclusion

Checking the right box(es) in Item B

- The decision depends (mostly) on stock ownership. (Acquisition and disposition events just describe a change in stock ownership by comparing status in two moments in time).
- Note that Categories 2, 3, and 4 have slightly expanded definitions of “United States person.”
- In Episode 4 we will deal with exemptions, rules that let you file less stuff, and how to apply Rev. Proc. 2019-40 in gruesome detail so you can choose 1a, 1b, or 1c — or maybe 5a, 5b, or 5c. And understand why.
- See you next month.

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Disclaimer

This is not legal advice and I am not your lawyer. Do not rely on this presentation—do your own research to verify that the information is correct and that it applies to you. Or hire someone intelligent to help you.