

# **Form 5471 (Rev. December 2021), Item B:**

## The Nine Filing Categories

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Philip D. W. Hodgen  
HodgenLaw PC | Pasadena, CA

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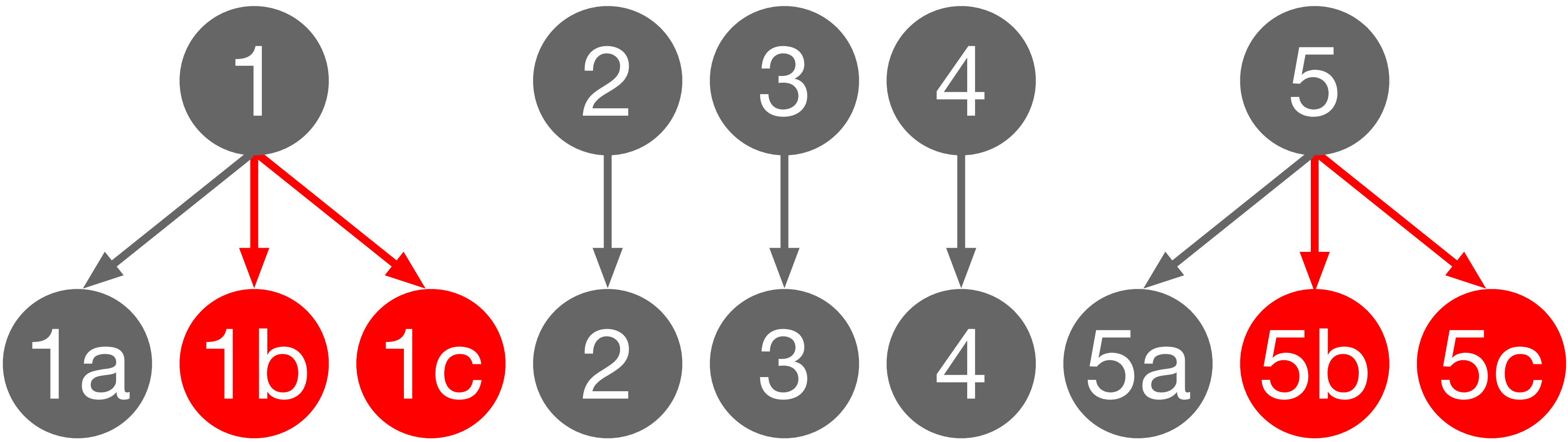
# Introduction

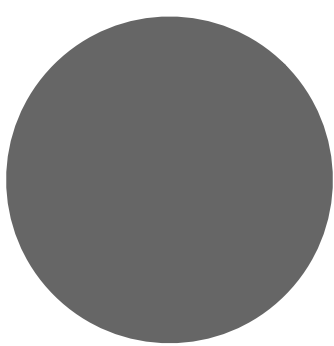
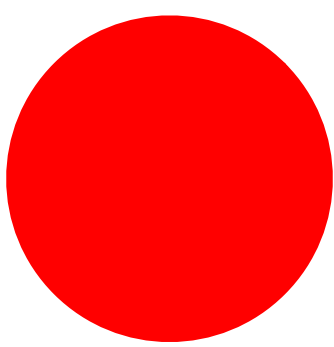
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# Form 5471 (rev. 12-2021), Item B

Form <b>5471</b>  (Rev. December 2021)  Department of the Treasury Internal Revenue Service	<b>Information Return of U.S. Persons With Respect to Certain Foreign Corporations</b>  ▶ Go to <i>www.irs.gov/Form5471</i> for instructions and the latest information.	OMB No. 1545-0123
	Information furnished for the foreign corporation's annual accounting period (tax year required by section 898) (see instructions) beginning _____, 20____, and ending _____, 20____	Attachment Sequence No. <b>121</b>
Name of person filing this return		<b>A Identifying number</b>
Number, street, and room or suite no. (or P.O. box number if mail is received only) _____		<b>B Category of filer</b> (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"/>
City or town, state, and ZIP code _____		<b>C</b> Enter the total percentage of the foreign corporation's voting stock you owned at the end of its annual accounting period _____ %

# The evolution to nine filing categories for Form 5471 (rev. 12-2021)



-  No change.
-  New. Repeal of IRC §958(b)(4), the curse of downward attribution, and the impact of Rev. Proc. 2019-40.

# Why it's important

- Different categories have different filing requirements.
- *Instructions for Form 5471 (rev. 01-2022), p. 5.*
- This is not the full table! There are more rows below this excerpt.
- Form 5471 penalties are big, so mistakes are expensive.

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 <b>Specific Instructions</b>	✓	✓	✓	✓	✓	✓	✓	✓	✓
Schedule A					✓	✓			
Schedule B, Part I					✓	✓			
Schedule B, Part II	✓		✓		✓	✓	✓		✓
Schedules C and F					✓	✓			
Separate Schedule E	✓	✓ <sub>1</sub>	✓ <sub>2</sub>			✓	✓	✓ <sub>1</sub>	✓ <sub>2</sub>
Schedule E-1 (included with separate Schedule E)	✓	✓ <sub>1</sub>				✓	✓	✓ <sub>1</sub>	
Schedule G			✓		✓	✓	✓		✓
Separate Schedule H						✓	✓		
Schedule I						✓	✓	✓	
Separate Schedule I-1						✓	✓	✓	✓

# What you need to know to answer Item B

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- Is the taxpayer a “**U.S. person**”? (All categories: either the category applies to U.S. persons, or “U.S. person” status is part of being a “U.S. shareholder”).
- Is the taxpayer a “**U.S. shareholder**”? (Categories 1a - 1c, 5a - 5c).
- Do you have a **corporation** that is a “**specified foreign corporation**” (Categories 1a - 1c), a “**foreign corporation**” (Categories 1 - 4), or a “**controlled foreign corporation**” (Categories 1a - c, 5a - 5c).
- A **bunch of fiddly definitions** for Categories 1b, 1c, 5b, 5c. These all come from Rev. Proc. 2019-40. More about these when we come to Category 5.

# Introduction: The Shareholder

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# First, is the Taxpayer a “United States Person?”

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Applies to all categories.



# Is the taxpayer a **U.S. person**?

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- Applies explicitly to Categories 2, 3, and 4.
- Applies implicitly to Categories 1a - 1c, 5a - 5c. (You need to know if a person or entity is a “U.S. person” in order to figure out if he/she/it is a “U.S. shareholder.”)
- The standard definition of U.S. person is at IRC §7701(a)(30).
  - Watch out for modifications to the standard definition. They are discussed below as they pop up.

# U.S. person (standard definition)

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)

Second, is the Taxpayer a “United States Shareholder?”

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# Is the taxpayer a **United States shareholder**?

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- The standard definition (as modified by Rev. Proc. 2019-40) applies for Categories 1a - 1c, 5a - 5c.
- (U.S. shareholder status is irrelevant for Categories 2, 3, and 4.)

## United States shareholder: standard definition

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“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.*

## That “10%” requirement for U.S. shareholder status

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- Go deep on the “know who the shareholders are and what they own” problem. Take great pains to follow the **attribution rules** to their termination point.
- **First Things First** in Form 5471 preparation: **make an organization chart.**
- A real diagram, not just words written on a piece of paper. Show shareholders by name, country, and citizen/resident/nonresident status. Don’t accept “I own x% of the stock.” See a stock certificate. Don’t accept the name/place of incorporation for a company. See the Articles of Incorporation.
- Get the organization chart approved by the client.

# Introduction: The Corporation

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Is the entity you are looking at a “foreign corporation?” (If yes, Form 5471 may be required; if not, you may be filing some other form).

# First, is it a “Corporation?”

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Applies to all filing categories.



# Is it a foreign **corporation**?

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- 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 the entity for U.S. tax purposes.
- 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). (Hint: they are corporations by default).

# Weird entities: dual chartered entities

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- This means that the entity simultaneously exists under the laws of two jurisdictions.
- E.g., you can register a foreign corporation in Delaware as a corporation. (Ask the internet about “domestication.”) Now you have a business that is simultaneously conducting operations as a foreign corporation and a domestic corporation.
- If it’s a “corporation” in either jurisdiction, it’s a corporation for Form 5471 purposes. If it is eligible to make the check-the-box election in both jurisdictions, you can Choose Your Own Adventure and make it disregarded or a partnership.
- Regs. §301.7701-2(b)(9).

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

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- 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.

# Weird entities: foundations (what to do about them?)

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- You can take a position and assert “trust” or “corporation” classification. YOLO.
- Or here’s an idea: use the check-the-box rules as a forcing function. File Form 8832 for the foundation. (Be sure to create “relevance” first. Reg. §301.7701-3(d)).
- If the IRS **rejects** your check-the-box election, it will do so because, in its opinion, the foundation **is not a “business entity”** and is therefore not eligible to make the check-the-box election. Cool. Now the IRS says you have a foreign trust.
- If the IRS **accepts** your check-the-box election, you have neutered the foreign corporation and Form 5471 risk, and the IRS says you have a disregarded entity (Form 8858) or foreign partnership (Form 8865). Those aren’t toxic like a CFC.

## Second, is it “Foreign” Corporation?

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Applies to all filing categories.



# Is this a **foreign** corporation?

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- **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).

# Third, is it a “Specified” Foreign Corporation?

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Category 1 only.

## Is it a **specified** foreign corporation?

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- Applies only for Categories 1a - 1c.
- This applies to situations where IRC §965 created a tax liability in the 2017 or 2018 tax years, and the tax hasn't been paid in full yet.
- You will care about this if you are helping someone clean up the wreckage of their past, or if you see lingering effects of IRC §965 on the prior year Form 5471 in the E & P.



## Fourth, it is a “Controlled” Foreign Corporation?

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Applies to categories 1, 4, 5.

# Is it a **controlled** foreign corporation?

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- Applies to Categories 5a - 5c.
- May apply to Categories 1a - 1c. (A controlled foreign corporation is one of the types of foreign corporations that can be a *specified* foreign corporation).
- As a practical matter, applies to Category 4 even though the Code and Regulations only refer to “foreign corporations.” (Category 4 requires the taxpayer to own > 50% of a foreign corporation and having a single U.S. shareholder who owns > 50% will make it into a *controlled* foreign corporation.)

# Introduction: The “Who” and the “What”

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“Who” is the shareholder. “What” is the type of entity. With those two pieces of information we can be precise in identifying potential filing categories for the taxpayer for whom you are preparing Form 5471.

# Who owns what? Check the box if you are . . .

Category	A “who” . . .	. . . of “what”?
1a	U.S. shareholder	Specified foreign corporation
1b	Unrelated §958(a) U.S. shareholder	Foreign-controlled specified foreign corporation
1c	Related constructive U.S. shareholder	Foreign-controlled specified foreign corporation
2	U.S. person	Foreign corporation
3	U.S. person	Foreign corporation
4	U.S. person	Foreign corporation
5a	U.S. shareholder	Controlled foreign corporation
5b	Unrelated §958(a) U.S. shareholder	Foreign-controlled controlled foreign corporation
5c	Related constructive U.S. shareholder	Foreign-controlled controlled foreign corporation

# Category 1

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# Category 1: who must file, generally

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- U.S. shareholders
- Of specified foreign corporations (which are a creature of IRC §965)

## 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.

# And keep filing as a Category 1 filer as long as there is E & P . . .

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- 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).

## U.S. shareholder for Category 1: add the time element of “end of year”

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- The standard definition of U.S. shareholder (IRC §951(b)) applies. Regs. §1.965-1(f)(47).
- In addition to being a U.S. shareholder “at any time in the year,” a Category 1a - 1c filer must also own the stock at the end of the year.
  - . . . “who owned that stock on the last day in that year on which the foreign corporation was an SFC, taking into account the regulations under section 965.” *Instructions for Form 5471 (rev. 01-2022), page 3.*



## Definition: specified foreign corporation

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- 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).

# Why was Category 1 split into Categories 1a - 1c?

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- Category 1a is the old Category 1, and if you do not fit into Categories 1b or 1c, you fall into the catch-all residual bucket that is Category 1a.
- Category 1b and 1c are the result of Rev. Proc. 2019-40. They help you adapt to the downward attribution problems created by the repeal of IRC §958(b)(4).
- The repeal created situations where a U.S. person might be a U.S. shareholder and a foreign corporation might be a controlled foreign corporation, solely through constructive ownership of stock by a U.S. person through a foreign person.

# Category 1a vs 1b vs 1c - attach different Schedules to Form 5471

Table of Required Information

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 <i>Specific Instructions</i>	✓	✓	✓	✓	✓	✓	✓	✓	✓
Schedule A					✓	✓			
Schedule B, Part I					✓	✓			
Schedule B, Part II	✓		✓		✓	✓	✓		✓
Schedules C and F					✓	✓			
Separate Schedule E	✓	✓ <sub>1</sub>	✓ <sub>2</sub>			✓	✓	✓ <sub>1</sub>	✓ <sub>2</sub>
Schedule E-1 (included with separate Schedule E)	✓	✓ <sub>1</sub>				✓	✓	✓ <sub>1</sub>	
Schedule G			✓		✓	✓	✓		✓
Separate Schedule G-1			✓		✓	✓	✓		✓
Separate Schedule H						✓	✓		
Schedule I						✓	✓	✓	
Separate Schedule I-1						✓	✓	✓	✓
Separate Schedule J	✓					✓	✓		
Separate Schedule M						✓			
Separate Schedule O, Part I				✓					
Separate Schedule O, Part II					✓				
Separate Schedule P	✓	✓				✓	✓	✓	
Separate Schedule Q						✓	✓	✓	
Separate Schedule R						✓	✓		
*See also <a href="#">Additional Filing Requirements</a> .									

## Category 1a filer is a . . .

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- U.S. shareholder
- Of a specified foreign corporation
- Who does not fit into Category 1b or Category 1c. (Details discussed below when we come to Category 5 and we talk about Categories 5b and 5c).
- This is the old normal Category 1.

## Categories 1b and 1c: downward attribution from a foreign person

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- 1b: you are a U.S. shareholder and you own foreign corporation stock within the meaning of IRC §958(a) [**direct or indirect stock ownership**] but you are **unrelated** to the foreign corporation within the meaning of IRC §954(d)(3).
- 1c: you are a U.S. shareholder of a foreign corporation **only** because of **constructive stock ownership from a foreign person** under IRC §318(a)(3), and you are **related** to the foreign corporation within the meaning of IRC §954(d)(3).
- Constructive ownership only plus unrelated status? No filing requirement at all.
- More below, in the discussion at Category 5.

# Category 2

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# Officers and directors are Category 2 filers

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- **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 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).



# U.S. person acquiring stock (as modified for Category 2)

Type of person acquiring stock	Explanation of the Category 2 definition of “U.S. Person”	Authority
U.S. citizen	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Resident alien	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Bona fide Puerto Rico resident	U.S. Person as defined in Regs. §1.957-3 and modified by Regs. §1.937-2(g)(1)	Regs. §1.6046-1(f)(3)(ii)(A)
Bona fide possessions resident	U.S. Person as defined in Regs. §1.957-3	Regs. §1.6046-1(f)(3)(ii)(B)
Nonresident alien with IRC §6013(g), (h) election	U.S. Person if an election is in effect and the person is not a Puerto Rico or possessions resident	Regs. §1.6046-1(f)(3)(iii)
Domestic partnership	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic corporation	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic estate	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic trust	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)



# What makes you an “officer or director”?

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- 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 “Assistant-Vice-Under-Administrative-Associate-Secretary-For-Minor-Functionary-Purposes, Second Class, With Power to Staple Pieces of Paper Together Only”? Is that person an “officer”?
  - What about honorific figureheads?

# What stock transfers trigger the reporting requirement?

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- A U.S. person acquires stock (all at once or in bits and pieces) until owning 10% by vote or value. Regs. §1.6046-1(a)(2)(i)(a).
- An existing U.S. shareholder acquires more stock (all at once or in bits and pieces) until owning at least 10% more, by vote or value. Regs. §1.6046-1(a)(2)(i)(b).
- Special rule for captive insurance companies. Regs. §1.6046-1(a)(2)(i)(c).

# How does an officer know how much stock is owned?

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- “*Ownership of Stock* — For purposes of subsection (a), stock owned directly or indirectly by a person (including, in the case of an individual, stock owned by members of his family) shall be taken into account. For purposes of the preceding sentence, the family of an individual shall be considered as including only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.” *IRC §6046(c)*.
- If you are an officer/director of a foreign corporation, you had better know everything about everyone who is a shareholder: direct, indirect, constructive, etc.
- Constructive ownership rules for Category 2: Regs. §1.6046-1(i).

# Category 3

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## Category 3 - Generally

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- A U.S person (modified definition)
- Acquires or disposes of stock in a foreign corporation in amounts that pass certain thresholds.

# U.S. person acquiring or disposing of stock (as modified for Category 3)

Type of person acquiring stock	Explanation of the Category 2 definition of “U.S. Person”	Authority
U.S. citizen	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Resident alien	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Bona fide Puerto Rico resident	U.S. Person as defined in Regs. §1.957-3 and modified by Regs. §1.937-2(g)(1)	Regs. §1.6046-1(f)(3)(ii)(A)
Bona fide possessions resident	U.S. Person as defined in Regs. §1.957-3	Regs. §1.6046-1(f)(3)(ii)(B)
Nonresident alien with IRC §6013(g), (h) election	U.S. Person if an election is in effect and the person is not a Puerto Rico or possessions resident	Regs. §1.6046-1(f)(3)(iii)
Domestic partnership	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic corporation	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic estate	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)
Domestic trust	Use IRC §7701(a)(30) definition	Regs. §1.6046-1(f)(3)(i)



# Acquisitions/dispositions: 10% movements

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- Acquiring enough stock to hit 10% by vote or value.
- Acquiring more stock to make a 10% incremental increase.
- Disposing of enough stock to fall under the 10% ownership threshold. (Note: no incremental 10% dispositions need be reported; only when you drop below 10% must you report stock transfer.)
- Also: change from nonresident alien to resident alien status while owning at least 10% stock. IRC §6046(a)(1)(D).

## Hidden triggers: examples

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- Nonresident alien family members: constructive ownership.
- Check-the-box election for the foreign corporation.
- Nonresident to resident alien status.
- U.S. person marries a nonresident alien.
- Reorganizations, stock redemptions, etc. might increase or decrease the U.S. person's stock ownership sufficiently to trigger a Category 3 filing requirement.



# Category 4

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# Who is a Category 4 filer?

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- A “U.S. person”
- Who “controls”
- A “foreign corporation.”

# Definition of U.S. person (as modified for Category 4)

Type of person acquiring stock	Explanation of the Category 2 definition of “U.S. Person”	Authority
U.S. citizen	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)
Resident alien	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)
Bona fide Puerto Rico resident	U.S. Person as defined in Regs. §1.957-3 and modified by Regs. §1.937-2(g)(1)	Regs. §1.6038-2(d)(2)(i)
Bona fide possessions resident	U.S. Person as defined in Regs. §1.957-3	Regs. §1.6038-2(d)(2)(ii)
Nonresident alien with IRC §6013(g), (h) election	U.S. Person if an election is in effect and the person is not a Puerto Rico or possessions resident	Regs. §1.6038-2(d)(3)
Domestic partnership	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)
Domestic corporation	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)
Domestic estate	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)
Domestic trust	Use IRC §7701(a)(30) definition	Regs. §1.6038-2(d)(1)

“Control” means stock ownership > 50% by vote or value

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“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.*

“Control” means stock ownership  $> 50\%$  **at any time in the year**

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“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.*

# Stock ownership > 50% includes **constructive ownership**

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

# Stock ownership rules that don't matter for Category 4

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- Stock ownership on the last day of the tax year. (That is Category 1, 5 only).
- Stock ownership for 30 straight days. (That rule is gone).
- Downward attribution triggered by the repeal of IRC §958(b)(4). (That Code section never applied to Category 4, so its repeal did not change anything for Category 4).

## Category 4 — Summary

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- “U.S. person” is more broadly defined than the standard definition.
- “Foreign corporation” uses the standard definition.
- “Control” is the crux of the Category 4 analysis, and constructive ownership is where you should spend your time.



## Category 5 - Generally

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IRC §6038(a)(4).

# Who is a Category 5 filer?

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- “U.S. shareholder who owns stock in a foreign corporation that is a CFC 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 a CFC.” *Instructions for Form 5471 (rev. January 2021), page 4.*
- Translation:
  - U.S. shareholder status at any time during the CFC’s tax year AND
  - Owns “that” stock on the last day in that year on which the foreign corporation was a “controlled foreign corporation”.

## Are you a U.S. shareholder for Category 5a - 5c?

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- The standard definition of **U.S. person** applies to Category 5.
- The standard definition of **U.S. shareholder** applies to Category 5.
- The hard work is in the **constructive ownership** rules.
  - Downward attribution rules matter because of the IRC §958(b)(4) repeal.

# The Impact of Rev. Proc. 2019-40 on Categories 1 and 5

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# Is this a CFC? You might not be able to figure that out

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“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.*

# Do you have includable gross income? It might be impossible to know

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“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.*

# So, what are your choices?

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- **~~Cry~~ Try harder.** (Ask unknown people impossible questions that they don't want to answer).
- **Safe harbor.** Use one of the safe harbors from Rev. Proc. 2019-40. Or get the filing requirement for Form 5471 waived entirely.

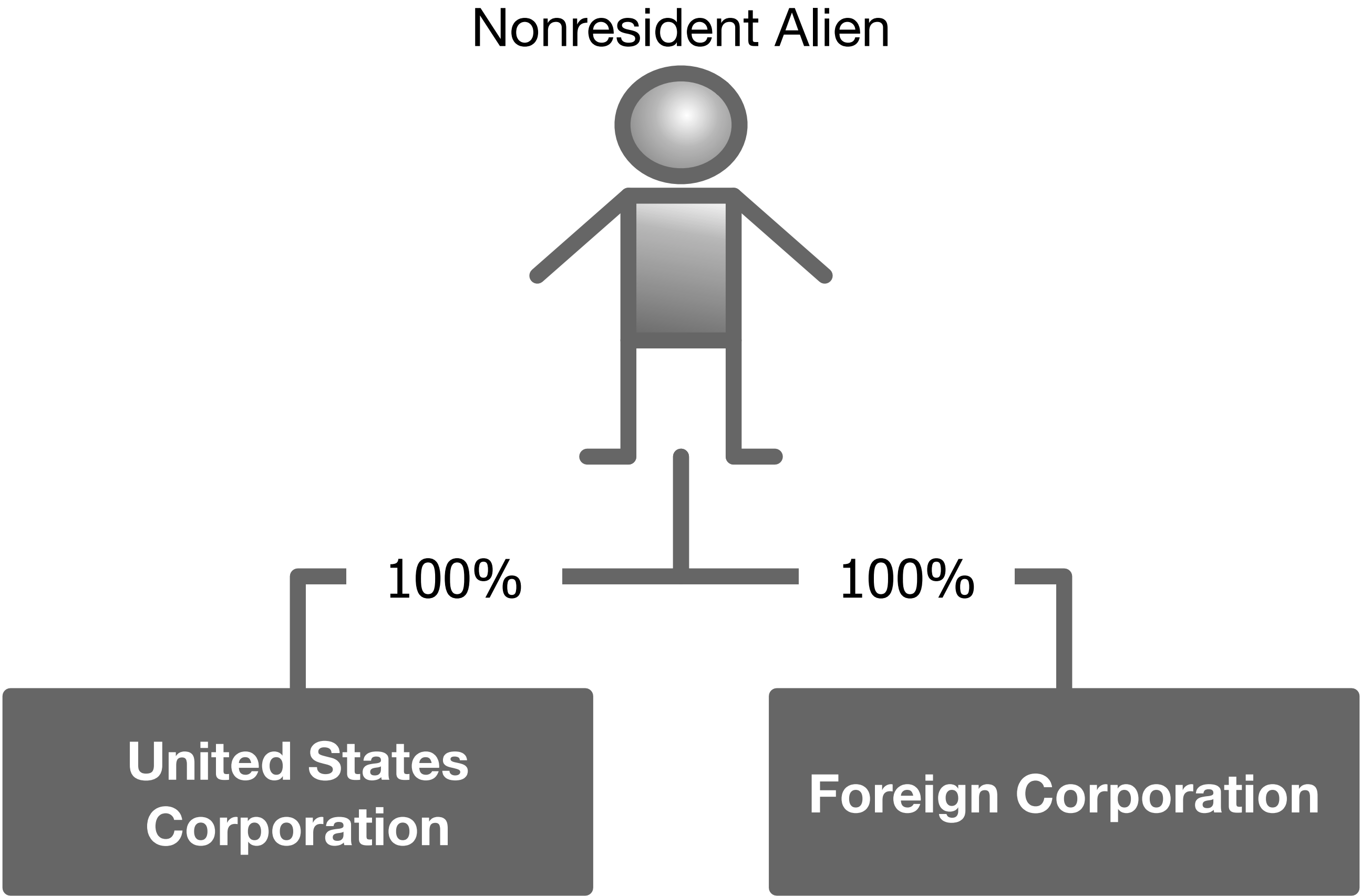
# Categories 1 and 5 after Rev. Proc. 2019-40

	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)	<b>“Related Constructive U.S. Shareholder” Categories 1c, 5c Rev. Proc. 2019-40, §8.03.</b>
Unrelated to the foreign-controlled CFC or SFC	<b>“Unrelated IRC §958(a) U.S. Shareholder” Categories 1b, 5b Rev. Proc. 2019-40, §8.02.</b>	<b>No Form 5471 filing requirement. Rev. Proc. 2019-40, §8.04; <i>Instructions for Form 5471 (rev. 01-2022)</i>, page 6.</b>

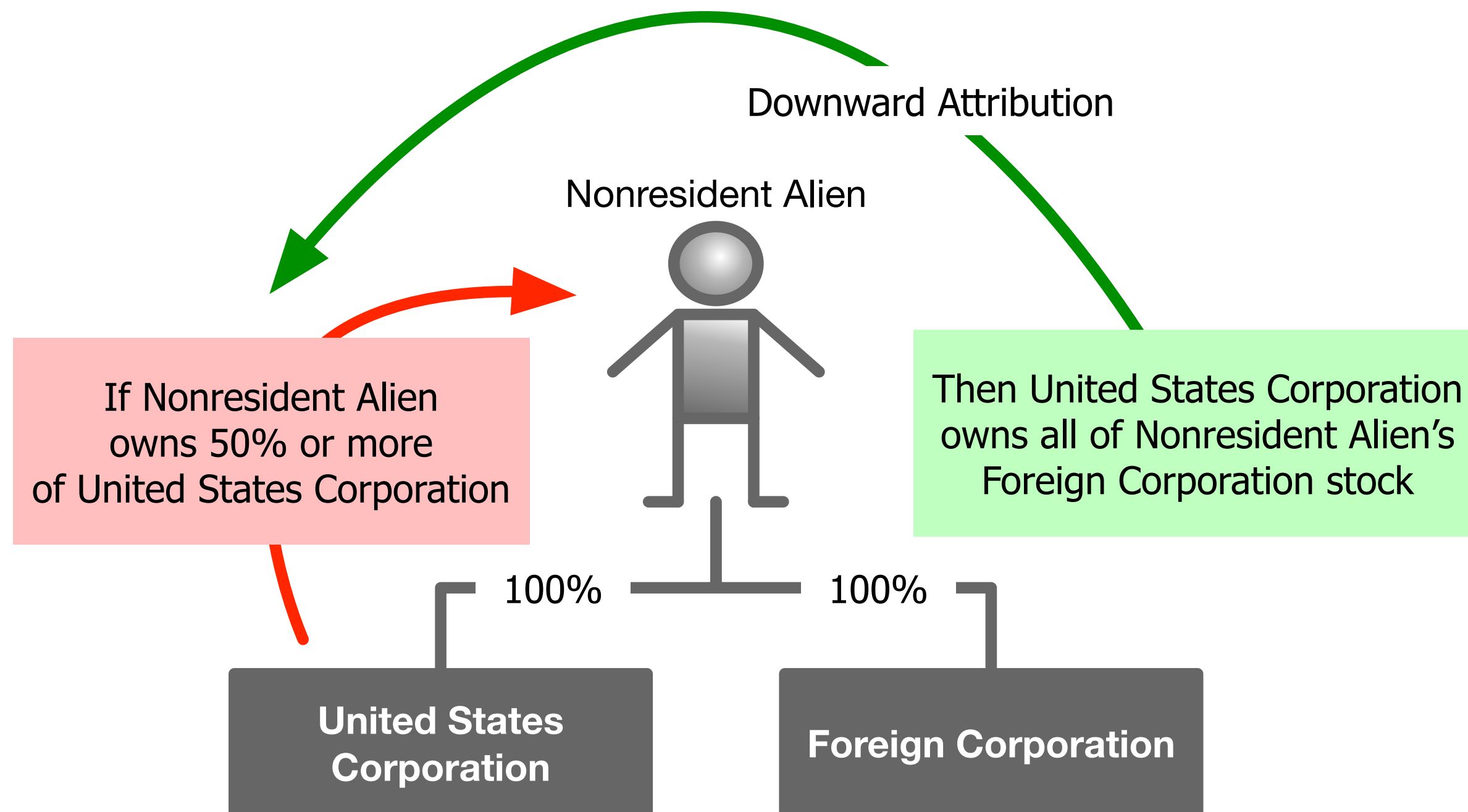


# United States Corporation is a Category 5c filer — why?

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# Foreign Corporation is a “Controlled Foreign Corporation”



## *IRC §318(a)(3)*

If 50 percent or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such corporation shall be considered as owning the stock owned, directly or indirectly, by or for such person.

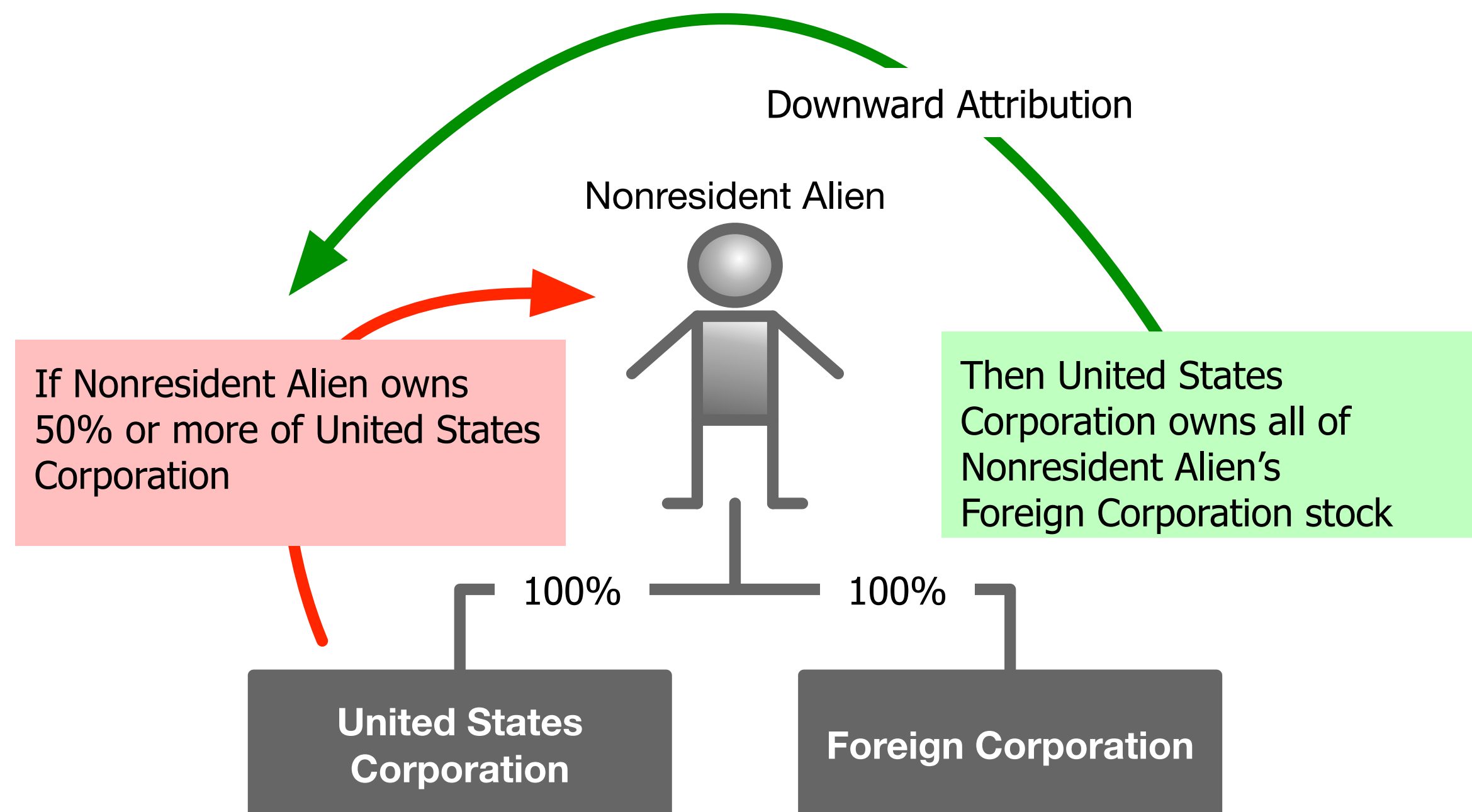
If 50 percent or more in value of the stock in UNITED STATES CORPORATION is owned, directly or indirectly, by NONRESIDENT ALIEN, [then] UNITED STATES CORPORATION shall be considered as owning the stock owned directly by NONRESIDENT ALIEN.

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

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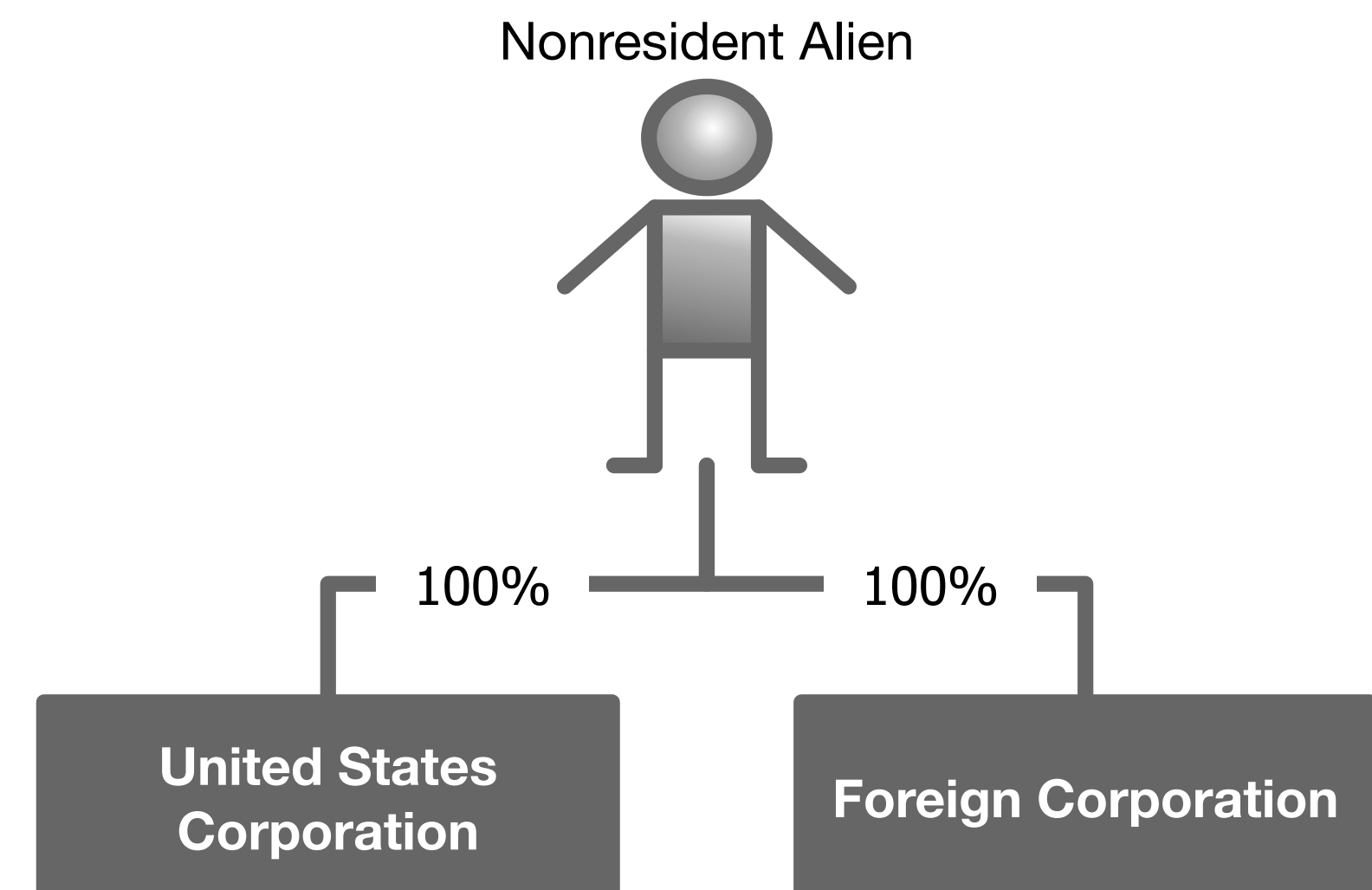
- Apply IRC §318(a)(3) attribution rules two ways: **with** attribution from foreign persons to U.S. persons, and **without** attribution from foreign persons to U.S. persons.
- **If** the corporation is a CFC (or SFC) when you have attribution from foreign persons to U.S. persons, **and** NOT a CFC (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.

# Foreign Corporation is a “foreign-controlled CFC”



Foreign Corporation is a controlled foreign corporation if we apply IRC §318(a)(3) downward attribution rules.

Foreign Corporation is a “foreign-controlled CFC” as defined in Rev. Proc. 2019-40, Section 3.09.



Foreign Corporation is not a controlled foreign corporation if we ignore IRC §318(a)(3) downward attribution rules.

# “Related”?

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- 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.

## IRC §954(d)(3) - are you related? The unmodified language

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- (3) *Related person defined.* For purposes of this section, a person is a related person with respect to a controlled foreign corporation, if—
  - (A) such person is an individual, corporation, partnership, trust, or estate which controls, or is controlled by, the controlled foreign corporation, or
  - (B) such person is a corporation, partnership, trust, or estate which is controlled by the same person or persons which control the controlled foreign corporation.



## IRC §954(d)(3)(B): “Related” status for Rev. Proc. 2019-40

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- (3) *Related person defined.* For purposes of this section, UNITED STATES CORPORATION is a related person with respect to a controlled foreign corporation, if—
  - (A) such person is an individual, corporation, partnership, trust, or estate which controls, or is controlled by, the controlled foreign corporation, or
  - (B) UNITED STATES CORPORATION is a corporation, ~~partnership, trust, or estate~~ which is controlled by the same person or persons which control the controlled foreign corporation.

## IRC §954(d)(3) - “control” means > 50%

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“For purposes of the preceding sentence, control means, with respect to a corporation, the ownership, **directly or indirectly**, of stock possessing **more than 50 percent** of the total voting power of all classes of stock entitled to vote or of the total value of stock of such corporation. In the case of a partnership, trust, or estate, control means the ownership, directly or indirectly, of more than 50 percent (by value) of the beneficial interests in such partnership, trust, or estate. For purposes of this paragraph, rules similar to the rules of section 958 shall apply.”

*IRC §954(d)(3). Emphasis added.*



# Conclusion: United States Corporation is a Category 1c/5c filer

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- United States Corporation is a **United States person**. IRC §7701(a)(30).
- United States Corporation is a **United States shareholder** of Foreign Corporation. IRC §§318(a)(3), 951(b), 958(b). It only constructively owns Foreign Corporation stock.
- Foreign Corporation is a “**controlled foreign corporation**.” IRC §957(a).
- It is a “**foreign-controlled CFC**” for Rev. Proc. 2019-40 purposes. Rev. Proc. 2019-40, §3.03.
- United States Corporation is “**related**” to Foreign Corporation. Rev. Proc. 2019-40, §3.09.
- Category c applies: United States Corporation is a **related constructive United States shareholder** of Foreign Corporation. Rev. Proc. 2019-40, §§3.05, 8.03.

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

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Unrelated to the foreign-controlled CFC or SFC	<b>“Unrelated IRC §958(a) U.S. Shareholder” Categories 1b, 5b Rev. Proc. 2019-40, §8.02.</b>	<b>No Form 5471 filing requirement. Rev. Proc. 2019-40, §8.04; <i>Instructions for Form 5471 (rev. 01-2022)</i>, page 6.</b>

# The End

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Philip D. W. Hodgen

HodgenLaw PC

140 South Lake Avenue, Suite 230

Pasadena, California 91101

[www.hodgen.com](http://www.hodgen.com)

w: +1 626 689 0060

[phil@hodgen.com](mailto:phil@hodgen.com)

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