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## THE POTENTIAL IMPLICATION OF THE SUPREME COURT'S HOLDING IN MERIT MANAGEMENT

*The Supreme Court's Merit decision is its first holding regarding the scope of the safe harbors in the U.S. Bankruptcy Code for securities contracts and other financial contracts. The authors discuss the case and then turn to (1) the discretion of a bankruptcy trustee to determine what constitutes a transfer for purposes of the Code's avoidance provisions; (2) preemption of avoidance actions under state law; (3) the definition of "financial institution" in the Code; and (4) textualism in interpreting the scope of safe harbor protections.*

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In *Merit Management Group, LP v. FTI Consulting, Inc.*,<sup>1</sup> the U.S. Supreme Court issued its first ever holding regarding the scope of the safe harbors in the U.S. Bankruptcy Code for securities and other financial contracts. The safe harbors provide two general kinds of protection. First, they protect the exercise by certain specified counterparties ("Protected Parties") of close-out, netting, and collateral rights under a financial contract, notwithstanding the Code's automatic stay, anti-*ipso facto* provisions, and other limitations on creditors' rights. Second, the safe harbors protect from many of the Code's avoidance provisions transfers made under or in connection with a financial contract that are to, by, or for, the benefit of a Protected Party. The Protected Parties for each type of protected financial contract differ.

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<sup>1</sup> *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

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*Merit* concerned the latter. In particular, it addressed the scope of Section 546(e). That provision states in relevant part that a bankruptcy "trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . made by or to (or for the benefit of) [a financial institution] or that is a transfer made by or to (or for the benefit of) [a financial institution] in connection with a securities contract[.]"<sup>2</sup> In its unanimous decision in *Merit*, the Supreme Court held that Section 546(e) does not apply merely because the challenged transfer is completed through a financial institution.

In reaching this holding, *Merit* settled a long-standing circuit split. However, the Court's holding, as well as the supporting reasoning and other dicta, raise questions regarding (i) the discretion of a bankruptcy trustee to

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<sup>2</sup> 11 U.S.C. § 546(e).

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