

### EXHIBIT III.

#### **Sample Provision Giving Independent Trustee Power to Grant Withdrawal Rights Over Retirement Accounts and Gross Income.**

*Note: "Retirement benefits," "independent Trustee," and "Primary Beneficiary" should be defined in the trust instrument.*

#### **Independent Trustee May Confer Power<sup>1</sup>**

After my death, the independent Trustee shall have the following powers with respect to any trust held hereunder:

A. Withdrawal Rights over Retirement Benefits. With respect to one or more taxable years, the independent Trustee may grant the Primary Beneficiary for whom the trust is named the absolute right to withdraw any retirement benefits distributed to the trust. I hope, but do not require, that the Primary Beneficiary exercises this withdrawal right only to pay the Primary Beneficiary's income tax generated by this withdrawal right. An example of such a withdrawal right is as follows: The Primary Beneficiary shall have the right to withdraw all retirement benefits distributed to the trust in each calendar year. Any retirement benefits not withdrawn by the Primary Beneficiary by the end of the calendar year shall be added to principal, if and to the extent they do not already constitute principal. An amount equal to any retirement benefits distributed to the trust but not withdrawn by the Primary Beneficiary shall remain subject to withdrawal by the Primary Beneficiary, and this withdrawal right may be satisfied from the trust's entire principal. On January 31 of the succeeding year and on January 31 of each subsequent year, any withdrawal right not exercised by the Primary Beneficiary shall be reduced by the maximum amount that the Primary Beneficiary could fail to withdraw on such date without such failure constituting a release of a general power of appointment under Code Section 2514. The independent Trustee may by written instrument delivered to the Trustee terminate this withdrawal right, but any termination shall affect only a withdrawal right that would otherwise arise after the effective date of the termination.

B. Withdrawal Rights over Gross Income. With respect to one or more taxable years, the independent Trustee also may grant the Primary Beneficiary the absolute right to withdraw any or all of the gross income of the trust for a given taxable year. I hope, but do not require, that the Primary Beneficiary exercises this withdrawal right only to pay the Primary Beneficiary's income tax generated by this withdrawal right. An example of such a withdrawal right is as follows: The Primary Beneficiary shall have the right to withdraw an amount equal to the gross income (as defined for federal income tax purposes) accruing to the trust for calendar year 20xx. Any income not withdrawn shall be added to principal and remain subject to withdrawal except to the extent the right of withdrawal lapses in accordance with the following sentence. On November 15 of the succeeding year and on November 15 of each subsequent year, any withdrawal right not exercised by the Primary Beneficiary shall be reduced by the maximum

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<sup>1</sup> This sample provision is based on a clause contained in Steve Gorin's "Drafting under the SECURE Act," (printed 06/06/2023), which manuscript is attached as Exhibit V.

amount that the Primary Beneficiary could fail to withdraw on such date without such failure constituting a release of a general power of appointment under Code Section 2514. The independent Trustee may by written instrument delivered to the Trustee terminate this withdrawal right, but any termination shall affect only a withdrawal right that would otherwise arise after the effective date of the termination.

C. No Duties or Limitations. Nothing in this Section shall be construed to:

1. Create or imply a duty on the part of any independent Trustee to exercise the powers specified in this Section, and no inference of impropriety shall be made as a result of an independent Trustee failing to exercise the same; or

2. Abridge the right of any Trustee who has a power to appoint property in further trust that arises under the terms of this trust or under any other provision of the law or common law, including a trustee decanting power granted by statute or otherwise.

## Sample Combined Trust Protector and Authorized Trustee Provision

*Note: Could use one Section or the other, instead of both. "Independent Trustee" should be defined in the trust instrument.*

### Section 1 Trust Protector and Trust Protector Amendment Power

The following provisions shall apply at such time as I am not living and competent:

A. Appointment. I appoint \_\_\_\_\_ as Trust Protector hereunder. As Trust Protector, the Trust Protector may, but is not required to, appoint any one or more successor Trust Protectors as provided in the following Paragraph. If \_\_\_\_\_ fails or ceases to act as Trust Protector and has not appointed one or more successor Trust Protectors, \_\_\_\_\_ shall serve as Trust Protector hereunder. As Trust Protector, the Trust Protector may, but is not required to, appoint any one or more successor Trust Protectors as provided in the following paragraph. \_\_\_\_\_ fails or ceases to act as Trust Protector and has not appointed one or more successor Trust Protectors, then \_\_\_\_\_ shall have the right by [unanimous action] to appoint any one or more successor Trust Protectors in accordance with the following Paragraph. No trust created under this trust instrument is required to have a Trust Protector acting with respect to that trust.

B. Successor. The Trust Protector acting from time to time (or, in the absence of the Trust Protector, such other individual having the right of appointment) may appoint any one or more individuals as successor Trust Protector other than (i) me, (ii) my spouse, (iii) a beneficiary under this trust instrument, (iv) a Trustee acting under this trust instrument, or (v) any person who is a related or subordinate party within the meaning of section 672(c) of the Code with respect to any person named in subparagraphs (i)-(iv) above. For purposes of this Paragraph, the term "beneficiary" shall mean any person who is named as a recipient of trust property under this trust instrument or who is, or in the future may be, eligible to receive trust property under any trust created hereunder. A person shall be considered a beneficiary for purposes of this Paragraph even if his or her only interest is as a potential distributee of trust property under a discretionary power held by a Trustee of any trust created hereunder, but shall not be considered a beneficiary for such purposes if his or her only interest hereunder is as a potential appointee under any non-fiduciary power of appointment held by another person which has not yet been exercised or the exercise of which can take effect only in the future, such as a testamentary power held by a living person. Any appointment of a successor Trust Protector shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protector (or, in the absence of the Trust Protector, such other individual having and exercising the right of appointment) may revoke any such appointment before it is accepted by the appointee, and may specify in the instrument of appointment whether it may be revoked by a subsequent holder of the right of appointment. In the event that two or more instruments of appointment or revocation by the same person exist and are inconsistent, the latest by date shall control.

C. Manner of Acceptance of Appointment of Trust Protector. The acceptance of the appointment of the initial Trust Protector and any successor Trust Protector shall be effected (i) by an instrument that has been signed by such Trust Protector in acceptance of the appointment and delivered to the then acting Trustee or (ii) by an instrument that has been signed

by such Trust Protector affirmatively exercising powers under this Section. These methods of acceptance by the initial or any successor Trust Protector shall be exclusive to any other method otherwise allowed by law.

D. Administrative Provisions. Any Trust Protector may resign by giving prior written notice to the Trustee. All trusts created under this trust instrument need not have or continue to have the same Trust Protector. The provisions of this trust instrument that relate to the Trust Protector shall be separately applicable to each trust held hereunder.

E. Power to Amend or Restate. The Trust Protector of each separate trust at any time in existence hereunder may, from time to time, notwithstanding any provision of this trust instrument to the contrary, and in addition to any other powers provided to the Trust Protector herein, amend or restate this trust instrument, including its dispositive, administrative, and other provisions of all kinds, as hereinafter provided in this Section. Such amendment or restatement shall be effective with respect to such trust, as well as to all trusts that are subsequently to come into existence under this trust instrument to hold part or all of the assets of such trust ("trusts that result from such trust"), without the consent of any interested party and without authorization by any court.

F. Grantor's Intent; Scope of Authority. The function of the Trust Protector is to assist, if needed, in achieving my objectives as manifested by the provisions of this trust instrument or as known by my Trust Protector. For example, I recognize that the gift, estate, generation-skipping transfer tax and income tax provisions of the Code and Treasury Regulations are subject to change, as are the needs and circumstances of my beneficiaries and state tax, disability, and creditor protection laws, and that changes may be useful to achieve favorable tax status under applicable law and to incorporate different trust drafting approaches to deal more effectively with trust purposes or potential trust problems (or to address scrivener's errors or otherwise improve the clarity and administrability of the trust provisions).

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C. The Trust Protector may, with respect to any trust as to which the Trust Protector is acting, modify or amend:

1. The trust administrative provisions, including those provisions governing the identity, qualification and succession of the Trustee.

2. The financial powers of the Trustee.

3. The terms of any trust created hereunder in such a way as (a) to achieve favorable tax status under applicable law, or (b) to change the governing law of the trust.

4. The terms of any trust created hereunder with respect to (a) the purposes for which a Trustee may distribute trust income and principal, the persons to whom trust property may be distributed, provided that the Trust Protector may only modify or amend the trust to remove persons as potential recipients of trust property, and the circumstances and factors the Trustee may take into account in making such distributions, including eliminating or adding an ascertainable standard to which distributions of income and principal would otherwise be subject, (b) the time for the distribution or withdrawal (including granting withdrawal rights) of any portion of the principal or income of the trust (but not a withdrawal right currently exercisable under the terms of the trust), (c) the termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period), (d) the grant, expansion, reduction, restriction, or elimination of general (as defined in section 2041 of the Code) and

limited powers of appointment with respect to part or all of any trust property (such powers may be made subject to any conditions or consents and limited to such objects as may be described in the grant or reduction of each power), (e) the division of a trust at any time (before or after it is funded with assets) into two or more separate trusts or subtrusts (representing fractional shares of any property being divided as provided in this trust instrument) or the merger of separate trusts together, and (f) revision of provisions of the trust instrument to allow any trust hereunder to qualify as an S corporation shareholder, including to allow such trust to qualify as either an electing small business trust or a qualified subchapter S trust.

G. Restrictions on Exercise of Powers. Notwithstanding the foregoing, however, and only with respect to a trust in existence at the time of the Trust Protector's modification or amendment (i.e., to which property has already been transferred), the Trust Protector shall not:

1. Reduce in any way the restrictions or limitations on:
  - a. Fiduciary actions as set forth in this trust instrument;
  - b. The Trust Protector's limited power of amendment under this Article; or
  - c. Who (or what institutions) can qualify to fill any office of Trustee hereunder (such as who is an independent Trustee), unless as a result of some change in the federal tax laws, regulations, or rulings on which taxpayers may rely, such reduction of restrictions and/or limitations will no longer have any adverse wealth transfer tax effect on such trust, any person who directly or indirectly has transferred assets to it, or any of its beneficiaries;

provided that any of such restrictions and limitations may be amended, irrevocably and binding on successors, to increase such restrictions and limitations in any way that such Trust Protector may deem appropriate.

2. Give:
  - a. Any Trustee any powers or discretions that are granted exclusively to a co-Trustee, or that such Trustee is excluded from exercising for any reason (e.g., the independent Trustee); or
  - b. Anyone acting in a nonfiduciary capacity any powers granted herein to fiduciaries,

unless, in either case, as a result of some change in the federal tax laws, regulations, or rulings on which taxpayers may rely, such reduction of restrictions and/or limitations will no longer have any adverse wealth transfer tax effect on such trust, any person who directly or indirectly has transferred assets to it, or any of its beneficiaries.

3. Make any change that would have the effect of disqualifying any such trust insofar as such trust, prior to such amendment, otherwise qualified for and was in fact already taking advantage of, while such advantage otherwise will continue:
  - a. Any exemption from a surviving spouse's elective right or from any creditor's right to levy on any beneficiary's interest in any such trust; or

b. Any substantial deduction, credit, exclusion, or other tax benefit (such as any marital or charitable deduction **(including a Marital Trust)**, any annual gift tax exclusion, a Code Section 2032A election, a Code Section 2057 election, a generation-skipping transfer tax exemption, the opportunity to be a stockholder in an S corporation, a significant grandfathered status under some changed law, and so on). However, this subparagraph b. shall not preclude an amendment that would change the provisions of any trust under this trust instrument in a way that results in (or might result in) adverse income or estate tax effects for me or for any beneficiary hereunder, even if the effect of such change might (i) subject the trust or its beneficiaries (rather than any donor) to any type of income, estate, or other tax on that trust's receipts and/or assets, or (ii) result in the loss of any tax benefit otherwise available to that trust or its beneficiaries, as long as the Trust Protector making such amendment reasonably believes that, under all of the circumstances, (a) such change is necessary to properly reflect the original intent of each person who has made any gift to the trust as to the effect of the pre-change trust provisions on the taxability of the trust and its beneficiaries, including the consequential effect of credits, deductions, cost basis step-ups, etc., or (b) in the case of an adverse income tax effect only, such change would be in the general long term best interests of the trust involved and its beneficiaries.

4. Result in any direct or indirect financial benefit (or grant any power of appointment) to any individual who is not at the time of such amendment already a beneficiary of such trust (other than merely through the exercise of a power of appointment), unless the amendment is to provide for afterborn or after-adopted children of any present or potential future beneficiary or the benefit that might result from the amendment requires an exercise of a power of appointment held by or granted to a beneficiary of such trust.

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5. If an individual made a qualified disclaimer under Code Sec. 2518, give such individual a power over such disclaimed property which would cause such disclaimer no longer to be qualified.

H. Liability and Indemnification. I acknowledge that a Trust Protector may modify or amend the trust in such a way as to decrease a beneficiary's share of the trust property, which is acceptable to me if consistent with my overall estate planning goals. The Trust Protector shall not be liable to any party for any decision of the Trust Protector absent gross negligence or willful misconduct or bad faith, and the Trust shall indemnify the Trust Protector and hold the Trust Protector harmless from any loss or expenses incurred by the Trust Protector for any decision, or for any action taken or foregone, if made in good faith and not tainted with gross negligence or willful misconduct or bad faith.

I. Nonfiduciary Capacity. The rights and powers conferred on the Trust Protector under this Article are held by the Trust Protector in a nonfiduciary capacity.

J. Power of Appointment. Notwithstanding any other provision of this trust instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this Trust instrument that would cause the Trust Protector to possess a general power of appointment within the meaning of sections 2041 and 2514 of the Code.

K. Adjustment of Powers. The Trust Protector acting from time to time on his or her own behalf and on behalf of all successor Trust Protectors may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this Trust instrument by a written instrument delivered to the Trustee.

L. Right to Information. Upon written request to the Trustee, the Trust Protector shall have the right to review the financial statements and accountings of the trust and the right generally to inspect the trust records.

M. No Duty to Monitor Trustee Actions. I am not imposing upon any person serving as Trust Protector the responsibility or duty to monitor the actions of the Trustee. No person serving as Trust Protector shall be liable for failing to amend the trust or for failing to act.

N. Compensation. In the event that a Trust Protector exercises his or her powers under this Article, the Trust Protector shall be entitled to reasonable compensation for such services. A professional Trust Protector shall be compensated at his or her (or its) regular professional rates.

O. Miscellaneous Duties and Limitations. Nothing in this Article shall be construed to:

1. Create or imply a duty of the Trust Protector having a power of amendment hereunder to exercise the power to distribute principal or income or for any other purpose, and no inference of impropriety shall be made as a result of the Trust Protector not exercising such power of amendment;

2. Abridge the right of any Trustee who has a power to appoint property in further trust that arises under the terms of this trust or under any other provision of the law or common law, including a trustee decanting power granted by statute or otherwise; or

3. Violate the provisions of any applicable law covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins or that determines the permissible period of the rule against perpetuities and suspension of power of alienation.

## **ARTICLE II TRUSTEE FLEXIBILITY PROVISIONS**

After my death, if there is no acting Trust Protector, or if the Trust Protector declines in writing to act, then the independent Trustee, as defined in the Section of Article VII of this trust instrument entitled "Definitions," of a separate trust under this trust instrument shall have the following powers with respect to such separate trust:

A. Power to Amend or Restate. The independent Trustee (referred to in this Article as the "Authorized Trustee") may, from time to time, notwithstanding any provision of this trust instrument to the contrary, and in addition to any other powers provided to the Authorized Trustee herein, amend or restate this trust instrument as it applies to such separate trust, including its dispositive, administrative, and other provisions of all kinds, as hereinafter provided in this Article. Such amendment or restatement shall be effective with respect to such trust, as well as to all trusts that are subsequently to come into existence under this trust instrument to hold part or all of the assets of such trust ("trusts that result from such trust"), without the consent of any interested party and without authorization by any court.

B. Grantor's Intent; Scope of Authority. The function of the Authorized Trustee is to assist, if needed, in achieving my objectives as manifested by the provisions of this

trust instrument or as otherwise known by the Authorized Trustee. For example, I recognize that the gift, estate, generation-skipping transfer tax and income tax provisions of the Code and Regulations are subject to change, as are the needs and circumstances of my beneficiaries and applicable federal and state law, including state tax, disability, and creditor protection laws, and that changes may be useful to achieve favorable tax status under applicable law and to incorporate different trust drafting approaches to deal more effectively with trust purposes or potential trust problems (or to address scrivener's errors or otherwise improve the clarity and administrability of the trust provisions).

The Authorized Trustee may, with respect to any trust as to which the Authorized Trustee is acting, modify or amend (including by restatement):

1. The trust administrative provisions, including those provisions governing the identity, qualification and succession of the Trustee.

2. The financial powers of the Trustee.

3. The terms of any trust created hereunder in such a way as (a) to achieve favorable tax status under applicable law, or (b) to change the governing law of the trust.

4. The terms of any trust created hereunder with respect to (a) the purposes for which a Trustee may distribute trust income and principal, the persons to whom trust property may be distributed, provided that the Authorized Trustee may only modify or amend the trust to remove persons as potential recipients of trust property, and the circumstances and factors the Trustee may take into account in making such distributions, including eliminating or adding an ascertainable standard to which distributions of income and principal would otherwise be subject, (b) the time for the distribution or withdrawal (including granting withdrawal rights) of any portion of the principal or income of the trust (but not a withdrawal right currently exercisable under the terms of the trust), (c) the termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period), (d) the grant, expansion, reduction, restriction, or elimination of general (as defined in section 2041 of the Code) and limited powers of appointment with respect to part or all of any trust property (such powers may be made subject to any conditions or consents and limited to such objects as may be described in the grant or reduction of each power), (e) the division of a trust at any time (before or after it is funded with assets) into two or more separate trusts or subtrusts (representing fractional shares of any property being divided as provided in this trust instrument) or the merger of separate trusts together, and (f) revision of provisions of the trust instrument to allow any trust hereunder to qualify as an S corporation shareholder, including to allow such trust to qualify as either an electing small business trust or a qualified subchapter S trust.

C. Restrictions on Exercise of Powers. Notwithstanding the foregoing, however, and only with respect to a trust in existence at the time of the Authorized Trustee's modification or amendment (i.e., to which property has already been transferred), the Authorized Trustee shall not:

1. Reduce in any way the restrictions or limitations on:

a. Fiduciary actions as set forth in this trust instrument;



b. The Authorized Trustee's limited power of amendment under this Article; or

c. Who (or what institutions) can qualify to fill any office of Trustee hereunder (such as who is an independent Trustee), unless as a result of some change in the federal tax laws, regulations, or rulings on which taxpayers may rely, such reduction of restrictions and/or limitations will no longer have any adverse wealth transfer tax effect on such trust, any person who directly or indirectly has transferred assets to it, or any of its beneficiaries, provided that any of such restrictions and limitations may be amended, irrevocably and binding on successors, to increase such restrictions and limitations in any way that such Authorized Trustee may deem appropriate.

2. Give:

a. Any Trustee any powers or discretions that are granted exclusively to a co-Trustee, or that such Trustee is excluded from exercising for any reason (e.g., certain powers are reserved only to an independent Trustee); or

b. Anyone acting in a nonfiduciary capacity any powers granted herein to fiduciaries,

unless, in either case, as a result of some change in the federal tax laws, regulations, or rulings on which taxpayers may rely, such reduction of restrictions and/or limitations will no longer have any adverse wealth transfer tax effect on such trust, any person who directly or indirectly has transferred assets to it, or any of its beneficiaries.

3. Make any change that would have the effect of disqualifying any such trust insofar as such trust, prior to such amendment, otherwise qualified for and was in fact already taking advantage of, while such advantage otherwise will continue:

a. Any exemption from a surviving spouse's elective right or from any creditor's right to levy on any beneficiary's interest in any such trust; or

b. Any substantial deduction, credit, exclusion, or other tax benefit (such as any marital or charitable deduction (including a Marital Trust), any annual gift tax exclusion, a Code Section 2032A election, a Code Section 2057 election, a generation-skipping transfer tax exemption, the opportunity to be a stockholder in an S corporation, a significant grandfathered status under some changed law, and so on). However, this subparagraph b shall not preclude an amendment that would change the provisions of any trust under this trust instrument in a way that results in (or might result in) adverse income or estate tax effects for any beneficiary hereunder, even if the effect of such change might (1) subject the trust or its beneficiaries to any type of income, estate, or other tax on that trust's receipts and/or assets, or (2) result in the loss of any tax benefit otherwise available to that trust or its beneficiaries, as long as the Authorized Trustee making such amendment reasonably believes that, under all of the circumstances, (a) such change is necessary to properly reflect my original intent and objectives as to the effect of the pre-change trust provisions on the taxability of the trust and its beneficiaries, including the consequential effect of credits, deductions, cost basis step-ups, etc., or (b) in the case of an adverse income tax effect only, such change would be in the general long term best interests of the trust involved and its beneficiaries.

4. If an individual made a qualified disclaimer under Code Sec. 2518, give such individual a power over such disclaimed property which would cause such disclaimer no longer to be qualified.

5. Result in any direct or indirect financial benefit (or grant any power of appointment) to any individual who is not at the time of such amendment already a beneficiary of such trust (other than merely through the exercise of a power of appointment), unless the amendment is to provide for afterborn or after-adopted children of any present or potential future beneficiary or the benefit that might result from the amendment requires an exercise of a power of appointment held by or granted to a beneficiary of such trust.

D. Liability and Indemnification. No Authorized Trustee shall be liable for any exercise of or failure to exercise this limited power of amendment (or for a release of this power) if such Authorized Trustee acted in good faith in taking or failing to take any such action (whether or not requested to do so by any beneficiary or any beneficiary's representative). In addition, the Authorized Trustee shall be authorized, in the Authorized Trustee's discretion, to advise and consult with legal counsel, and to obtain a legal opinion therefrom, regarding any potential exercise or non-exercise of such power of amendment and shall not be liable for or chargeable with any action taken or not taken in reliance on such consultation or opinion. The cost of such consultation and/or opinion shall be paid from the assets of the trust. This Article does not create or imply a duty to exercise the powers granted hereunder or to inform beneficiaries about possible modifications or amendments permitted under this Article.

E. Power of Appointment. Notwithstanding any other provision of this instrument, the Authorized Trustee shall not participate in the exercise of a power or discretion conferred under this instrument that would cause the Authorized Trustee to possess a general power of appointment within the meaning of sections 2041 and 2514 of the Code.

F. Adjustment of Powers. The Authorized Trustee acting from time to time on his or her own behalf and on behalf of all successor Trustees may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this instrument by a written instrument delivered to the Trustee.

G. Miscellaneous Duties and Limitations. Nothing in this Article shall be construed to:

1. Create or imply a duty of the Authorized Trustee having a power of amendment hereunder to exercise the power to distribute principal or income or for any other purpose, and no inference of impropriety shall be made as a result of the Authorized Trustee not exercising such power of amendment;

2. Abridge the right of any Trustee who has a power to appoint property in further trust that arises under the terms of this trust or under any other provision of the law or common law, including a trustee decanting power granted by statute or otherwise; or

3. Violate the provisions of any applicable law covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins or that determines the permissible period of the rule against perpetuities and suspension of power of alienation.