Testimony of Gary M. Berne Regarding Senate Bill 96
April 24, 2017 Hearing
Before the House Committee on Business and Labor

Chair and Members of the Committee, thank you for the opportunity to testify before you today. My name is Gary Berne and I am a lawyer with the law firm of Stoll Berne in Portland. I am here today to testify regarding my support for Senate Bill 96 A.

I am have been in the private practice of law for almost forty years. Much of my practice has included representing investors who have been the victims of various forms of wrongdoing, including securities fraud, breach of fiduciary duty, and elder abuse.

One relatively recent problem that I see are cases where there is negligence or other wrongdoing by an investment adviser (IA) who is unsupervised except for occasional audits by the State of Oregon. The problem arises when customers of the IA have claims against the IA and the IA does not have insurance or other assets to pay the claim. In addition, collection also has always been a problem if the wrongdoing is by a small broker-dealer or a very unscrupulous one of the sort that is not likely to have sufficient assets to pay claims.

In the case of an IA, the IA may be a one person firm so that the person effectively is his or her own supervisor and compliance person. Thus, there will no supervision and no assets to pay a claim. Yet, the IA likely will have complete discretion to make the investment decisions for the customer. The customer typically will sign trading authority forms that give the IA the authority to buy and sell stocks or mutual funds (or other investments) through an account at a securities broker-dealer, and the broker-dealer will have custody of the assets. The broker-dealer is usually a completely separate firm from the IA and often is a firm such as Charles Schwab or Fidelity. In the typical situation, the customer will have signed an account agreement with the

broker-dealer that gives complete authority to the IA, and the broker-dealer will disclaim liability.

The customer is not aware of the risk because it is very unlikely that the customer will consider in advance what assets will be available to pay a claim if something goes wrong. The customer goes into the arrangement having placed his or her complete trust in the IA and is very unlikely to ask for proof of insurance or other evidence of the IA's net worth. Yet, the IA has responsibility for handling hundreds of thousands of dollars for each customer and millions of dollars in total.

As one example, I have had two recent cases that involved widows, one in her 80's and one in her 70's, who were placed in very high risk exchange traded funds (ETFs) that were triple-leveraged short funds. This meant that the customer only made money if the stock market went down. If the stock market went up, the customer would lose $3 for every dollar the market went up. FINRA had issued a warning to the securities industry that these funds were suitable only for short term traders, not elderly customers. No responsible person involved in the securities business would excuse this kind of behavior. Of course, the stock market has been going up and the accounts had huge losses. The only difference in the cases was that one customer had gone to a stockbroker, and the broker-dealer through whom the stockbroker was registered had significant assets and paid the claim. In the other case, the customer had gone to an IA who had no assets and no insurance. The customer received nothing.

HB 96 will help to prevent situations like this.

Thank you.