Steve McManus
Senior Vice President and General Counsel
309.766.0826 Fax 309.766.1783
steve.mcmanus.benm@statefarm.com

One State Farm Plaza
Bloomington, Illinois 61710-0001

October 9, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

State Farm Mutual Automobile Insurance Company ("State Farm") and its millions of customers are highly dependent on a well-functioning civil justice system that is accessible, equitable, predictable and efficient. As State Farm's General Counsel, I appreciate the critical role the Advisory Committee on Evidence Rules ("Committee") plays in promoting a well-functioning civil justice system by ensuring the Federal Rules of Evidence (FRE) are fair, plainly understood, and uniformly applied. I applaud and thank the Committee for its diligent focus on Rule 702, and write to urge you to move forward in amending the rule to clarify the courts' "gatekeeping" responsibilities. I also take this opportunity to encourage the committee to act on the strongly worded suggestion by the United State Supreme Court in *Wal-Mart Stores v. Dukes*[1] and pronounce that Rule 702 applies at the class certification stage. In *Dukes* the Supreme Court stated, "The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so…"[2]

In State Farm's experience, some of the courts do not fully and consistently execute the "gatekeeping" function, which requires a determination that the proponent qualifying an expert witness has met his/her burden by a preponderance of the evidence, consistent with Rule 104(a). The lack of consistency creates confusion about the court's role that results in admission of unreliable opinion testimony that misleads juries, undermines civil justice, and erodes confidence in the courts. With full appreciation for the Committee's caution about amendments that clarify rather than change standards, I respectfully urge you to amend Rule 702 to remedy the inconsistency in practice by clarifying the courts' gatekeeping responsibilities and encouraging them to apply Rule 702 as intended.

Additionally, given the mixed jurisprudence among the lower courts, I urge you to make clear in an amendment (or Comment) that Rule 702 applies at the class certification stage. As Rule 1101 makes clear, all proceedings before a district court must follow the Federal Rules of

[1] 564 U.S. 338 (2011)
[2] *Id.* at 354 (2011)

Evidence. With respect to class actions, the Committee should appreciate that expert testimony can be the deciding factor in whether or not to certify a class. Three well-known class action examples from the U.S. Supreme Court illustrate this point: *Comcast Corp. v. Behrend*[3] turned on the rejection of testimony from an economic expert supposedly offering a classwide damage model; *Wal-Mart Stores, Inc. v. Dukes*[4] centered in part around whether to admit testimony from a plaintiff's expert about the allegedly discriminatory culture at Wal-Mart (the Court rejected it); and *Tyson Foods, Inc. v. Bouaphakeo*[5] rested on the admission of testimony from a statistics expert. The certification decision often signals the end of class action litigation. A decision to certify can create bet-the-company litigation that usually results in a classwide settlement, while a decision to deny certification typically leads to settlement or trial of only the named plaintiff's claims. A decision of this magnitude should not be subject to the inconsistency and uncertainty presently seen in the execution of many courts' gatekeeping responsibilities.

Thank you for your consideration and the opportunity to weigh in on these critical topics.

Sincerely,

Steve McManus
Senior Vice President and General Counsel

SM/sk

[3] 569 U.S. 27 (2013)
[4] 564 U.S. 338 (2011)
[5] 136 S. Ct. 1036 (2016)