

VIVUS INC
Form DFAN14A
April 16, 2013

SCHEDULE 14A

Consent Statement Pursuant to Section 14(a)

of the Securities Exchange Act of 1934 (Amendment No. __)

Filed by the Registrant []

Filed by a Party other than the Registrant [x]

Check the appropriate box:

- Preliminary Proxy Statement
- Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))
- Definitive Proxy Statement
- Definitive Additional Materials
- Soliciting Material Under Rule 14a-12

VIVUS, Inc.

(Name of Registrant as Specified In Its Charter)

First Manhattan Co.

First Health, L.P.

First Health Limited

First Health Associates, L.P.

First BioMed Management Associates, LLC

First BioMed, L.P.

First BioMed Portfolio, L.P.

Michael James Astrue

Jon C. Biro

Samuel F. Colin

Johannes J.P. Kastelein

David York Norton

Herman Rosenman

Rolf Bass

Melvin L. Keating

(Name of Person(s) Filing Consent Statement, if other than the Registrant)

Payment of Filing Fee (check the appropriate box):

No fee required.

Fee computed on table below per Exchange Act Rule 14a-6(i)(4) and 0-11.

1) Title of each class of securities to which transaction applies:

2) Aggregate number of securities to which transaction applies:

3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

4) Proposed maximum aggregate value of transaction:

5) Total fee paid:

Fee paid previously with preliminary materials.

Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

1) Amount Previously Paid:

2) Form, Schedule or Registration Statement No.:

3) Filing Party:

4)Date Filed:

On April 12, 2013, First Manhattan Co. and its affiliates (collectively, "First Manhattan") filed a Schedule 13D Amendment with the Securities and Exchange Commission which attached as an exhibit a letter from First Manhattan to VIVUS, Inc. ("Vivus"). Such letter responded to a request from Vivus that the Nominating and Governance Committee of its board of directors (the "Board") be given the opportunity to interview each of the individuals nominated by First Manhattan (the "Nominees") for election to the Board and that the Nominees complete questionnaires provided by Vivus. The letter expressed First Manhattan's willingness to allow the Nominating and Governance Committee to interview the Nominees, but expressed concern that such a request could be used as a tactic to delay the 2013 annual meeting of stockholders (the "Annual Meeting"). The letter also included a request by First Manhattan that Vivus publicly commit to holding the Annual Meeting no later than June 30, 2013 and confirm that the date of the Annual Meeting will not be delayed without the mutual written agreement of First Manhattan and Vivus. A copy of the letter is attached as Exhibit 1.