

VIVUS INC
Form SC 13D/A
April 17, 2013

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 13D/A

Under the Securities Exchange Act of 1934
(Amendment No. 3)*

VIVUS, Inc.
(Name of Issuer)

Common Stock, \$0.001 par value
(Title of Class of Securities)

928551100
(CUSIP Number)

Neal K. Stearns, Esq.

First Manhattan Co.

399 Park Avenue

New York, New York 10022

(212) 756-3300

With a copy to:

Marc Weingarten and David Rosewater

Schulte Roth & Zabel LLP

919 Third Avenue

New York, New York 10022
(Name, Address and Telephone Number of Person
Authorized to Receive Notices and
Communications)

April 15, 2013
(Date of Event Which Requires Filing of This
Statement)

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If the filing person has previously filed a statement on Schedule 13G to report the acquisition that is the subject of this Schedule 13D, and is filing this schedule because of Rule 13d-1(e), Rule 13d-1(f) or Rule 13d-1(g), check the following box. []

(Page 1 of 8 Pages)

* The remainder of this cover page shall be filled out for a reporting person's initial filing on this form with respect to the subject class of securities, and for any subsequent amendment containing information which would alter disclosures provided in a prior cover page.

The information required on the remainder of this cover page shall not be deemed to be "filed" for the purpose of Section 18 of the Securities Exchange Act of 1934 ("Act") or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act (however, see the Notes).

1 NAME OF REPORTING PERSON

First Manhattan Co.

2 CHECK THE APPROPRIATE x

BOX IF A MEMBER OF (b) " A GROUP

3 SEC USE ONLY

SOURCE OF FUNDS

4 AF

CHECK BOX IF

DISCLOSURE OF LEGAL

5 PROCEEDING IS

REQUIRED PURSUANT

TO ITEMS 2(d) or 2(e)

CITIZENSHIP OR PLACE OF

6 ORGANIZATION

New York

SOLE VOTING POWER

7

5,348,179 shares of Common Stock

NUMBER OF SHARES BENEFICIALLY OWNED BY EACH REPORTING PERSON WITH: **8** SHARED VOTING POWER

3,855,195 shares of Common Stock

9 SOLE DISPOSITIVE POWER

5,348,179 shares of

Common Stock
SHARED
DISPOSITIVE
POWER

10

3,855,195
shares of
Common Stock

AGGREGATE
AMOUNT
BENEFICIALLY
OWNED BY EACH
PERSON

11

9,203,374 shares of
Common Stock

CHECK IF THE
AGGREGATE
AMOUNT IN
ROW (11) ..

12

EXCLUDES
CERTAIN
SHARES
PERCENT OF CLASS
REPRESENTED BY
AMOUNT IN ROW (11)

13

9.1%
TYPE OF REPORTING
PERSON

14

BD; IA; PN

| | |
|-----------|---|
| | NAME OF REPORTING PERSON |
| 1 | First BioMed Management Associates, LLC |
| | CHECK THE APPROPRIATE <input checked="" type="checkbox"/> x |
| 2 | BOX IF A MEMBER OF (b) " |
| | A GROUP |
| 3 | SEC USE ONLY |
| | SOURCE OF FUNDS |
| 4 | AF CHECK BOX IF DISCLOSURE OF LEGAL PROCEEDING IS REQUIRED PURSUANT TO ITEMS 2(d) or 2(e) |
| 5 | CITIZENSHIP OR PLACE OF ORGANIZATION |
| | New York |
| | NUMBER OF SHARES BENEFICIALLY OWNED BY EACH REPORTING PERSON WITH: |
| | SOLE VOTING POWER |
| 7 | 0 |
| | SHARED VOTING POWER |
| 8 | 2,706,800 shares of Common Stock |
| | SOLE DISPOSITIVE POWER |
| 9 | 0 |
| 10 | |

SHARED
DISPOSITIVE
POWER

2,706,800
shares of
Common Stock

11 AGGREGATE
AMOUNT
BENEFICIALLY
OWNED BY EACH
PERSON

2,706,800 shares of
Common Stock

12 CHECK IF THE
AGGREGATE
AMOUNT IN
ROW (11) ..

13 EXCLUDES
CERTAIN
SHARES
PERCENT OF CLASS
REPRESENTED BY
AMOUNT IN ROW (11)

14 2.7%
TYPE OF REPORTING
PERSON

IA

1 NAME OF REPORTING PERSON

Herman Rosenman

2 CHECK THE APPROPRIATE x

BOX IF A

MEMBER OF (b) "

3 A GROUP

SEC USE ONLY

4 SOURCE OF FUNDS

PF

CHECK BOX

IF

DISCLOSURE

OF LEGAL

5 PROCEEDING

IS

REQUIRED

PURSUANT

TO ITEMS

2(d) or 2(e)

CITIZENSHIP OR

PLACE OF

6 ORGANIZATION

United States

NUMBER OF SHARES

SOLE

BENEFICIALLY OWNED BY

7

VOTING

POWER

EACH

5,000 shares of

REPORTING

Common Stock

PERSON WITH:

8

SHARED

VOTING

POWER

0

SOLE

DISPOSITIVE

9

POWER

5,000 shares of

Common Stock

10

SHARED

DISPOSITIVE

POWER

| | |
|-----------|---|
| | 0 |
| 11 | AGGREGATE AMOUNT BENEFICIALLY OWNED BY EACH PERSON |
| | 5,000 shares of Common Stock |
| 12 | CHECK IF THE AGGREGATE AMOUNT IN ROW (11) .. |
| 13 | EXCLUDES CERTAIN SHARES PERCENT OF CLASS REPRESENTED BY AMOUNT IN ROW (11) |
| 14 | 0.0% TYPE OF REPORTING PERSON |
| | IN |

CUSIP No. 928551100 SCHEDULE 13D/A Page 5 of 8 Pages

This Amendment No. 3 ("Amendment No. 3") amends and supplements the statement on Schedule 13D filed with the Securities and Exchange Commission (the "SEC") on January 18, 2013 (the "Original Schedule 13D"), Amendment No. 1 to the Original Schedule 13D, filed with the SEC on March 8, 2013 ("Amendment No. 1") and Amendment No. 2 to the Original Schedule 13D, filed with the SEC on April 12, 2013 ("Amendment No. 2") and together with the Original Schedule 13D, Amendment No. 1 and this Amendment No. 3, the "Schedule 13D") with respect to the shares of common stock, \$0.001 par value (the "Common Stock"), of VIVUS, Inc., a Delaware corporation (the "Issuer"). Capitalized terms used herein and not otherwise defined in this Amendment No. 3 have the meanings set forth in the Schedule 13D. This Amendment No. 3 amends Items 3, 4, 5 and 7 as set forth below.

Item 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION

Item 3 of the Schedule 13D is hereby amended and restated in its entirety as follows:

The shares of Common Stock referred to in Item 5 as beneficially owned by First Manhattan were purchased by the entities listed therein for an aggregate consideration equal to \$98,496,221. The source of the funds used to acquire the Common Stock reported herein as beneficially owned by First Manhattan is the working capital of the pooled investment vehicles managed by FMC or FBMA and the available funds in the Accounts (as defined in Item 5). An aggregate of 58,800 of such shares held by certain of the Accounts are held in commingled margin accounts, which may extend margin credit to such Accounts from time to time, subject to applicable federal margin regulations, stock exchange rules and credit policies. In such instances, the positions held in the margin accounts are pledged as collateral security for the repayment of debit balances in the accounts. The margin accounts bear interest at a rate based upon the broker's call rate from time to time in effect. Because other securities are held in the margin accounts, it is not possible to determine the amounts, if any, of margin used to purchase such shares of Common Stock held by certain of the Accounts as reported herein.

Approximately \$53,054 in the aggregate was used to purchase the Common Stock reported herein as beneficially owned by Mr. Rosenman. The source of the funds used to acquire the Common Stock reported herein as beneficially owned by Mr. Rosenman is the personal funds of Mr. Rosenman and none of the funds used to purchase such Common Stock were provided through borrowings of any nature.

Item 4. PURPOSE OF TRANSACTION

Item 4 of the
Schedule 13D
is hereby
amended and
supplemented

by the
addition of the
following:

On April 15, 2013, outside legal counsel to FMC sent a letter to the Issuer's counsel in response to a second request from the Issuer's counsel that each of the individuals nominated by FMC (the "Nominees") for election to the board of directors of the Issuer (the "Board") at the Issuer's 2013 annual meeting of stockholders (the "Annual Meeting") submit to interviews by the Nominating and Governance Committee of the Board. The letter reiterated FMC's willingness to have the Nominating and Governance Committee

interview the Nominees. However, the letter expressed FMC's continuing concern that such a request could be used as a tactic to delay the Annual Meeting, noting that the Issuer had failed to commit to holding the Annual Meeting no later than June 30, 2013 and the Nominating and Governance Committee had failed to commit to complete the requested interview process by April 21, 2013, as FMC had requested. The letter reiterated FMC's requests, expressed FMC's belief as to the importance of a timely Annual Meeting in order to resolve the uncertainty

surrounding the Board's composition, and noted that the Issuer has held its annual meeting in every one of the last sixteen years prior to June 30. A copy of the April 15 response letter is attached as Exhibit 7 to the Schedule 13D and is incorporated by reference herein.

Item 5. INTEREST IN SECURITIES OF THE ISSUER

Paragraphs (a) and (c) of Item 5 of the Schedule 13D are hereby amended and restated in their entirety as follows:

(a) The aggregate number and percentage of shares of Common Stock to which this Schedule 13D relates is 9,208,374 shares of Common Stock, constituting approximately 9.1% of the Issuer's currently outstanding Common Stock. Share ownership is reported as of the close of business on April 15, 2013. The aggregate number and percentage of shares of Common Stock reported herein are based upon the 100,660,029 shares of Common Stock outstanding as of February 19, 2013, as reported in the Issuer's Annual Report on Form 10-K for the fiscal year ended December 31, 2012, filed with the SEC on February 26, 2013.

FMC may be deemed to beneficially own an aggregate of 9,203,374 shares of Common Stock, or approximately 9.1% of the outstanding Common Stock, which shares include (i) 3,353,275 shares of Common Stock, or approximately 3.3% of the outstanding Common Stock, directly held by First Health, L.P., First Health Limited and First Health Associates, L.P., pooled investment vehicles for which FMC acts as the investment advisor; (ii) 2,706,800 shares of Common Stock, or approximately 2.7% of the outstanding Common Stock, directly held by First BioMed, L.P. and First BioMed Portfolio, L.P., pooled investment vehicles for which FBMA acts as the investment advisor; and (iii) 3,143,299 shares of Common Stock, or approximately 3.1% of the outstanding Common Stock, held by (x) certain investment advisory accounts for which FMC acts as the investment advisor (the "Investment Accounts"), (y) discretionary brokerage accounts for which certain portfolio managers of FMC have discretionary authority (the "Brokerage Accounts"), and (z) accounts held and managed by partners and employees of FMC, including 500,000 shares of Common Stock held in Dr. Colin's personal account and 42,000 shares of Common Stock held by trusts established for the benefit of Dr. Colin's family members (the "Employee Accounts" and together with the Investment Accounts and Brokerage Accounts, the "Accounts").

FBMA may be deemed to beneficially own an aggregate of 2,706,800 shares of Common Stock, or approximately 2.7% of the outstanding Common Stock, which shares are directly held by First BioMed, L.P. and First BioMed Portfolio, L.P., pooled investment vehicles for which FBMA acts as the investment advisor.

Mr. Rosenman may be deemed to beneficially own an aggregate of 5,000 shares of Common Stock, or approximately 0.0% of the outstanding Common Stock. Such shares of Common Stock are held in an Individual Retirement Account for the benefit of Mr. Rosenman.

For purposes of the Schedule 13D, the term "First Manhattan" refers to FMC, First Health, L.P., First Health Limited, First Health Associates, L.P., FBMA, First BioMed, L.P., First BioMed Portfolio, L.P. and the Accounts, collectively.

(c) Schedule A hereto (which is incorporated by reference in this Item 5 as if restated in full herein) sets forth all transactions with respect to the shares of Common Stock effected since the filing of Amendment No. 2.

Item 7. MATERIAL TO BE FILED AS EXHIBITS

Item 7 of the Schedule 13D is hereby amended and supplemented by the addition of the following:

Exhibit Description

7 Letter, dated April 15, 2013

SIGNATURES

After reasonable inquiry and to the best of its knowledge and belief, each of the undersigned certifies that the information set forth in this statement is true, complete and correct.

Date: April 17, 2013

First manhattan co.

By first manhattan llc, General Partner

By: /s/ Neal K. Stearns
Name: Neal K. Stearns
Title: Managing Member

FIRST BIOMED MANAGEMENT ASSOCIATES, LLC

By FIRST MANHATTAN CO., Co-Managing Member

By FIRST MANHATTAN LLC, General Partner

By: /s/ Neal K. Stearns
Name: Neal K. Stearns
Title: Managing Member

By: /s/ Herman Rosenman
Herman Rosenman

Schedule A

The following table sets forth all transactions with respect to the shares effected since the filing of Amendment No. 2 by any of the Reporting Persons. Except as otherwise noted, all such transactions in the table were effected in the open market, and the table includes commissions paid in per share prices.

First Manhattan

| <u>Date of Transaction</u> | <u>Shares Purchased (Sold)</u> | <u>Price per Share (\$)</u> |
|----------------------------|--------------------------------|-----------------------------|
| 04/15/2013 | 8,600 | 11.110 |
| 04/15/2013 | 7,500 | 11.141 |
| 04/15/2013 | 5,500 | 11.151 |