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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
Washington, D.C. 20549

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**FORM 10-Q**

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☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the Quarterly Period Ended March 31, 2018

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number 001-33389

**VIVUS, INC.**

(Exact name of registrant as specified in its charter)

**Delaware**

(State or other jurisdiction of  
incorporation or organization)

**94-3136179**

(IRS employer  
identification number)

**900 E. Hamilton Avenue, Suite 550  
Campbell, California**

(Address of principal executive office)

**95008**

(Zip Code)

**(650) 934-5200**

(Registrant's telephone number, including area code)

**N/A**

(Former name, former address and former fiscal year, if changed since last report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (\$232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☐

Accelerated filer ☒

Non-accelerated filer ☐

Smaller reporting company ☐

(Do not check if a smaller reporting  
company)

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). ☐ Yes ☒ No

At April 30, 2018, 106,054,094 shares of common stock, par value \$.001 per share, were outstanding.

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VIVUS, INC.

Quarterly Report on Form 10-Q

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**PART I: FINANCIAL INFORMATION**
**ITEM 1. CONDENSED CONSOLIDATED FINANCIAL STATEMENTS (UNAUDITED)**
**VIVUS, INC.**
**CONDENSED CONSOLIDATED BALANCE SHEETS**  
**(In thousands, except par value)**

	March 31, 2018	December 31, 2017
ASSETS	Unaudited	
Current assets:		
Cash and cash equivalents	\$ 76,805	\$ 66,392
Available-for-sale securities	132,320	159,943
Accounts receivable, net	11,291	12,187
Inventories	21,006	17,712
Prepaid expenses and other current assets	6,447	7,178
Total current assets	247,869	263,412
Property and equipment, net	510	542
Non-current assets	924	1,014
Total assets	<u>\$ 249,303</u>	<u>\$ 264,968</u>
LIABILITIES AND STOCKHOLDERS' DEFICIT		
Current liabilities:		
Accounts payable	\$ 4,786	\$ 10,072
Accrued and other liabilities	20,788	21,475
Deferred revenue	2,179	2,075
Current portion of long-term debt	836	5,147
Total current liabilities	28,589	38,769
Long-term debt, net of current portion	235,671	230,536
Deferred revenue, net of current portion	4,279	4,674
Non-current accrued and other liabilities	307	327
Total liabilities	268,846	274,306
Commitments and contingencies		
Stockholders' deficit:		
Preferred stock; \$1.00 par value; 5,000 shares authorized; no shares issued and outstanding at March 31, 2018 and December 31, 2017	—	—
Common stock; \$.001 par value; 200,000 shares authorized; 106,041 and 105,977 shares issued and outstanding at March 31, 2018 and December 31, 2017, respectively	106	105
Additional paid-in capital	835,654	834,730
Accumulated other comprehensive loss	(1,085)	(608)
Accumulated deficit	(854,218)	(843,565)
Total stockholders' deficit	(19,543)	(9,338)
Total liabilities and stockholders' deficit	<u>\$ 249,303</u>	<u>\$ 264,968</u>

See accompanying notes to unaudited condensed consolidated financial statements.

**VIVUS, INC.**

**CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS**  
(In thousands, except per share data)  
(Unaudited)

	Three Months Ended March 31,	
	2018	2017
Revenue:		
Qsymia product revenue, net	\$ 9,632	\$ 17,620
License and milestone revenue	—	5,000
Supply revenue	1,683	3,812
Royalty revenue	585	580
Total revenue	11,900	27,012
Operating expenses:		
Cost of goods sold	2,721	6,167
Selling, general and administrative	10,068	11,431
Research and development	1,403	2,180
Total operating expenses	14,192	19,778
(Loss) income from operations	(2,292)	7,234
Interest expense and other expense, net	8,349	8,302
Loss before income taxes	(10,641)	(1,068)
Provision for (benefit from) income taxes	12	(12)
Net loss	\$ (10,653)	\$ (1,056)
Basic and diluted net loss per share:	\$ (0.10)	\$ (0.01)
Shares used in per share computation:		
Basic and diluted	106,014	105,479

**CONDENSED CONSOLIDATED STATEMENTS OF COMPREHENSIVE LOSS**

(In thousands)  
(Unaudited)

	Three Months Ended March 31,	
	2018	2017
Net loss	\$ (10,653)	\$ (1,056)
Unrealized (loss) gain on securities, net of taxes	(477)	125
Comprehensive loss	\$ (11,130)	\$ (931)

See accompanying notes to unaudited condensed consolidated financial statements.

**VIVUS, INC.**  
**CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS**  
(In thousands)  
(Unaudited)

	Three Months Ended March 31,	
	2018	2017
<b>Cash flows from operating activities:</b>		
Net loss	\$ (10,653)	\$ (1,056)
Adjustments to reconcile net loss to net cash used for operating activities:		
Depreciation and amortization	157	252
Amortization of debt issuance costs and discounts	5,414	4,935
Amortization of discount or premium on available-for-sale securities	121	245
Share-based compensation expense	925	727
Changes in assets and liabilities:		
Accounts receivable	896	(1,965)
Inventories	(3,294)	(1,004)
Prepaid expenses and other assets	730	3,740
Accounts payable	(5,286)	200
Accrued and other liabilities	(707)	4,740
Deferred revenue	(291)	(17,886)
Net cash used for by operating activities	(11,988)	(7,072)
<b>Cash flows from investing activities:</b>		
Property and equipment purchases	(34)	(21)
Purchases of available-for-sale securities	(7,604)	(20,915)
Proceeds from maturity of available-for-sale securities	28,336	12,234
Proceeds from sales of available-for-sale securities	6,293	820
Net cash provided by (used for) investing activities	26,991	(7,882)
<b>Cash flows from financing activities:</b>		
Repayments of notes payable	(4,590)	(2,076)
Net cash used for financing activities	(4,590)	(2,076)
<b>Net increase (decrease) in cash and cash equivalents</b>	<b>10,413</b>	<b>(17,030)</b>
<b>Cash and cash equivalents:</b>		
Beginning of year	66,392	84,783
End of period	<u>\$ 76,805</u>	<u>\$ 67,753</u>

See accompanying notes to unaudited condensed consolidated financial statements.

**VIVUS, INC.****NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS****MARCH 31, 2018****1. BASIS OF PRESENTATION**

VIVUS is a specialty pharmaceutical company developing and commercializing innovative, next-generation therapies to address unmet medical needs in human health. The Company has two approved therapies and one product candidate in active clinical development. Qsymia® (phentermine and topiramate extended release) is approved by FDA for chronic weight management. STENDRA® (avanafil) is approved by FDA for erectile dysfunction, or ED, and by the European Commission, or EC, under the trade name SPEDRA, for the treatment of ED in the EU. Tacrolimus is in active clinical development and is being studied in patients with pulmonary arterial hypertension, or PAH.

In May 2018, the Company announced it had entered into an agreement to acquire the U.S. and Canadian commercial rights for PANCREAZE® (pancrelipase). The closing of this acquisition is subject to governmental reviews and is expected to close before the end of the second quarter of 2018. PANCREAZE is indicated for the treatment of exocrine pancreatic insufficiency due to cystic fibrosis or other conditions.

Qsymia incorporates a proprietary formulation combining low doses of active ingredients from two previously approved drugs, phentermine and topiramate, and is being commercialized by the Company in the U.S. primarily through a small sales force supported by an internal commercial team, who promote Qsymia to physicians. Avanafil is an oral phosphodiesterase type 5 inhibitor that is being commercialized in the U.S., EU and other countries through commercialization collaborators.

The accompanying unaudited condensed consolidated financial statements have been prepared in accordance with accounting principles generally accepted in the United States of America, or U.S. GAAP, for interim financial information and with the instructions to Form 10-Q and Article 10 of Regulation S-X. Accordingly, they do not include all of the information and footnotes required by U.S. GAAP for complete financial statements. In the opinion of management, all adjustments (consisting of normal recurring adjustments) considered necessary for a fair presentation have been included. Operating results for the three months ended March 31, 2018 are not necessarily indicative of the results that may be expected for the year ending December 31, 2018. Management has evaluated all events and transactions that occurred after March 31, 2018 through the date these unaudited condensed consolidated financial statements were filed. Other than those disclosed in Note 17, there were no events or transactions during this period that require recognition or disclosure in these unaudited condensed consolidated financial statements. The December 31, 2017 condensed consolidated balance sheet data was derived from audited financial statements, but does not include all disclosures required by U.S. GAAP.

The unaudited condensed consolidated financial statements should be read in conjunction with the audited financial statements and notes thereto included in the Company's Annual Report on Form 10-K for the year ended December 31, 2017 as filed on March 14, 2018 with the Securities and Exchange Commission, or SEC, and as amended by the Form 10-K/A filed on April 26, 2018 with the SEC. The unaudited condensed consolidated financial statements include the accounts of VIVUS, Inc. and its wholly-owned subsidiaries. All significant intercompany accounts and transactions have been eliminated.

When reference is made to the "Company" or "VIVUS" in these footnotes, it refers to the Delaware corporation, or VIVUS, Inc., and its California predecessor, as well as all of its consolidated subsidiaries.

*Use of Estimates*

The preparation of these unaudited condensed consolidated financial statements requires management to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues, expenses and related disclosures. On an ongoing basis, the Company evaluates its estimates, including critical accounting policies or estimates related to available-for-sale securities, debt instruments, research and development expenses, income taxes, inventories, revenues, contingencies and litigation and share-based compensation. The Company bases its estimates on historical experience, information received from third parties and on various market specific and other relevant assumptions that it believes to be reasonable under the circumstances, the results of which form the basis

for making judgments about the carrying values of assets and liabilities that are not readily apparent from other sources. Actual results could differ significantly from those estimates under different assumptions or conditions.

#### *Significant Accounting Policies*

There have been no changes to the Company's significant accounting policies since the Company's Annual Report on Form 10-K for the year ended December 31, 2017 with the exception of its revenue recognition policy. See Note 2.

#### *Recent Accounting Pronouncement Adopted*

In May 2014, the Financial Accounting Standards Board, or FASB, issued Accounting Standards Update No. 2014-09, *Revenue from Contracts with Customers*. This standard is a comprehensive new revenue recognition model that requires revenue to be recognized in a manner to depict the transfer of goods or services to a customer at an amount that reflects the consideration expected to be received in exchange for those goods or services. This new standard supersedes most previously-existing revenue recognition guidance. The Company adopted this standard in the first quarter of 2018 using the modified retrospective basis. See Note 2.

In August 2016, the FASB issued Accounting Standards Update 2016-15, *Statement of Cash Flows (Topic 230) Classification of Certain Cash Receipts and Cash Payments*. The standard clarifies how certain cash receipts and cash payments will be presented and classified in the statement of cash flows. The Company adopted this standard in the first quarter of 2018, and it had no impact on its consolidated financial statements.

#### *Recent Accounting Pronouncements Not Yet Adopted*

In February 2016, the FASB issued Accounting Standards Update 2016-02, *Leases (Topic 842)*, which modifies the accounting by lessees for all leases with a term greater than 12 months. This standard will require lessees to recognize on the balance sheet the assets and liabilities for the rights and obligations created by those leases. For public companies, this standard is effective for annual and interim periods beginning on or after December 15, 2018. Early adoption is permitted. The Company's only significant lease is its operating lease for its corporate headquarters, although it has numerous smaller leases, and, while the Company cannot yet estimate the amounts by which its financial statements will be affected by the adoption of this guidance, it expects that the overall recognition of expense will be similar to current guidance, though possibly in different classifications, but that there will be a significant change in the balance sheet due to the recognition of right of use assets and the corresponding lease liabilities. The Company plans to adopt the new leases guidance effective January 1, 2019 using a modified retrospective transition method.

## **2. REVENUES**

On January 1, 2018, the Company adopted Accounting Standards Update No. 2014-09, *Revenue from Contracts with Customers*, or Topic 606. Topic 606 supersedes the revenue recognition requirements in Topic 605 *Revenue Recognition*, or Topic 605, and requires entities to recognize revenue when control of the promised goods or services is transferred to customers at an amount that reflects the consideration to which the entity expects to be entitled to in exchange for those goods or services.

The Company adopted Topic 606 as of January 1, 2018 using the modified retrospective transition method applied to those contracts which were not completed as of January 1, 2018. Results for reporting periods beginning on or after January 1, 2018 are presented under Topic 606, while prior period amounts are not adjusted and continue to be reported in accordance with our historic accounting under Topic 605. Revenue amounts as reported for the first quarter of 2017 under Topic 605 are approximately the same as they would have been under Topic 606. Due in large part to the change in accounting estimate made by the Company in the first quarter of 2017, there was no cumulative impact of adopting Topic 606 and the Company did not record a change to its opening retained earnings as of January 1, 2018.

### *Revenue Recognition*

For all revenue transactions, the Company evaluates its contracts with its customers to determine revenue recognition using the following five-step model:

- 1) The Company identifies the contract(s) with a customer
- 2) The Company identifies the performance obligations in the contract
- 3) The Company determines the transaction price
- 4) The Company allocates the transaction price to the identified performance obligations
- 5) The Company recognizes revenue when (or as) the entity satisfies a performance obligation

### *Product Revenue:*

Product revenue is recognized at the time of shipment at which time the Company has satisfied its performance obligation. Product revenue is recognized net of consideration paid to the Company's customers, wholesalers and certified pharmacies. Such consideration is for services rendered by the wholesalers and pharmacies in accordance with the wholesalers and certified pharmacy services network agreements, and includes a fixed rate per prescription shipped and monthly program management and data fees. These services are not deemed sufficiently separable from the customers' purchase of the product; therefore, they are recorded as a reduction of revenue at the time of revenue recognition.

Other product revenue allowances include a reserve for estimated product returns, certain prompt pay discounts and allowances offered to the Company's customers, program rebates and chargebacks. These product revenue allowances are recognized as a reduction of revenue at the date at which the related revenue is recognized. The Company also offers discount programs to patients. Calculating certain of these items involves estimates and judgments based on sales or invoice data, contractual terms, utilization rates, new information regarding changes in these programs' regulations and guidelines that would impact the amount of the actual rebates or chargebacks. The Company reviews the adequacy of product revenue allowances on a quarterly basis. Amounts accrued for product revenue allowances are adjusted when trends or significant events indicate that adjustment is appropriate and to reflect actual experience. See Note 9 for product reserve balances.

### *Change in Accounting Estimate in 2017*

The Company ships units of Qsymia through a distribution network that includes certified retail pharmacies. The Company began shipping Qsymia in September 2012 and grants rights to its customers to return unsold product from six months prior to and up to 12 months subsequent to product expiration. This has resulted in a potential return period of from 24 to 36 months depending on the ship date of the product. As the Company had no previous experience in selling Qsymia and given its lengthy return period, the Company was not initially able to reliably estimate expected returns of Qsymia at the time of shipment, which was required by the accounting literature at the time, and therefore recognized revenue when units were dispensed to patients through prescriptions, at which point the product was not subject to return, or when the expiration period had ended.

Beginning in the first quarter of 2017, with 48 months of returns experience, the Company believed that it had sufficient data and experience from selling Qsymia to reliably estimate expected returns. Therefore, beginning in the first quarter of 2017, under the then relevant accounting literature, the Company began recognizing revenue from the sales of Qsymia upon shipment and recording a reserve for expected returns at the time of shipment.

In accordance with this change in accounting estimate, in the first quarter of 2017 the Company recognized a one-time adjustment relating to products that had been previously shipped, consisting of \$17.9 million of gross revenues, adjusted for an expected returns reserve of \$5.7 million and estimated gross-to-net charges of \$4.9 million, for a net impact of \$7.3 million in revenues. The Company also recorded increased cost of goods sold of \$0.6 million and marketing expense of \$0.7 million associated with the change in accounting estimate. The increase in net product revenue resulted in a decrease in net loss of \$6.0 million or \$0.06 per share for the three months ended March 31, 2017.

### *Supply Revenue:*

The Company produces STENDRA/SPEDRA through a contract manufacturing partner and then sells it to its commercialization partners. The Company is the primary responsible party in the commercial supply

arrangements and bears significant risk in the fulfillment of the obligations, including risks associated with manufacturing, regulatory compliance and quality assurance, as well as inventory, financial and credit loss. As such, the Company recognizes supply revenue on a gross basis as the principal party in the arrangements. The Company recognizes supply revenue at the time of shipment and, in the unusual case where the product does not meet contractually-specified product dating criteria at the time of shipment to the partner, the Company records a reserve for estimated product returns. There are no such reserves as of March 31, 2018.

#### *License and Milestone Revenue*

License and milestone revenues related to arrangements, usually license and/or supply agreements, entered into by the Company are recognized by following the five-step process outlined above. The allocation and timing of recognition of such revenue will be determined by that process and the amounts recognized and the timing of that recognition may not exactly follow the wording of the agreement as the amount allocated following the accounting analysis of the agreement may differ and the timing of recognition of a significant performance obligation may predate the contractual date.

#### *Royalty Revenue*

The Company relies on data provided by its collaboration partner in determining its contractually-based royalty revenue. Such data includes accounting estimates and reports for various discounts and allowances, including product returns. The Company records royalty revenues based on the best data available and makes any adjustments to such revenues as such information becomes available.

#### *Revenue by Source and Geography*

Net product revenue disaggregated by revenue source and by geographic region was as follows (in thousands):

	Three Months Ended March 31,					
	2018			2017		
	U.S.	ROW	Total	U.S.	ROW	Total
Qsymia—Product revenue, net	\$ 9,632	\$ —	\$ 9,632	\$ 17,620	\$ —	\$ 17,620
Qsymia—License revenue	—	—	—	5,000	—	5,000
STENDRA/SPEDRA—Supply revenue	547	1,136	1,683	3,775	37	3,812
STENDRA/SPEDRA—Royalty revenue	—	585	585	—	580	580
Total revenue	\$ 10,179	\$ 1,721 (1)	\$ 11,900	\$ 26,395	\$ 617 (2)	\$ 27,012

(1) \$1.7 million of which was attributable to Germany.

(2) \$0.6 million of which was attributable to Germany.

### **3. SHARE-BASED COMPENSATION**

Total share-based compensation expense for all of the Company's share-based awards was as follows (in thousands):

	Three Months Ended March 31,	
	2018	2017
Cost of goods sold	\$ 13	\$ 14
Selling, general and administrative	832	628
Research and development	80	85
Total share-based compensation expense	\$ 925	\$ 727

Share-based compensation costs capitalized as part of the cost of inventory were \$1,000 and \$4,000 for the three months ended March 31, 2018 and 2017, respectively.

#### 4. CASH, CASH EQUIVALENTS, AND AVAILABLE-FOR-SALE SECURITIES

The fair value and the amortized cost of cash, cash equivalents, and available-for-sale securities by major security type are presented in the tables that follow (in thousands).

	As of March 31, 2018			
	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
<b>Cash and cash equivalents and available-for-sale securities</b>				
Cash and money market funds	\$ 76,805	\$ —	\$ —	\$ 76,805
U.S. Treasury securities	15,066	—	(178)	14,888
Corporate debt securities	118,339	15	(922)	117,432
Total	210,210	15	(1,100)	209,125
Less amounts classified as cash and cash equivalents	(76,805)	—	—	(76,805)
Total available-for-sale securities	\$ 133,405	\$ 15	\$ (1,100)	\$ 132,320

	As of December 31, 2017			
	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
<b>Cash and cash equivalents and available-for-sale securities</b>				
Cash and money market funds	\$ 66,392	\$ —	\$ —	\$ 66,392
U.S. Treasury securities	21,070	1	(139)	20,932
Corporate debt securities	139,481	16	(486)	139,011
Total	226,943	17	(625)	226,335
Less amounts classified as cash and cash equivalents	(66,392)	—	—	(66,392)
Total available-for-sale securities	\$ 160,551	\$ 17	\$ (625)	\$ 159,943

As of March 31, 2018, the Company's available-for-sale securities had original contractual maturities up to 67 months. However, the Company may sell these securities prior to their stated maturities in response to changes in the availability of and the yield on alternative investments as well as liquidity requirements. As these securities are readily marketable and are viewed by the Company as available to support current operations, securities with maturities beyond 12 months are classified as current assets. Due to their short-term maturities, the Company believes that the fair value of its bank deposits, accounts payable and accrued expenses approximate their carrying value.

##### *Fair Value Measurements*

Fair value is defined as the exchange price that would be received for an asset or paid to transfer a liability in the principal or most advantageous market for the asset or liability in an orderly transaction between market participants on the measurement date. Valuation techniques used to measure fair value must maximize the use of observable inputs and minimize the use of unobservable inputs. Three levels of inputs, of which the first two are considered observable and the last unobservable, may be used to measure fair value. The three levels are:

- Level 1 — Quoted prices in active markets for identical assets or liabilities.
- Level 2 — Inputs other than Level 1 that are observable, either directly or indirectly, such as quoted prices for similar assets or liabilities; quoted prices in markets that are not active; or other inputs that are observable or can be corroborated by observable market data for substantially the full term of the assets or liabilities.
- Level 3 — Unobservable inputs that are supported by little or no market activity and that are significant to the fair value of the assets or liabilities.

The following table represents the fair value hierarchy for our cash equivalents and available-for-sale securities by major security type (in thousands):

	As of March 31, 2018			
	Level 1	Level 2	Level 3	Total
Cash and money market funds	\$ 76,805	\$ —	\$ —	\$ 76,805
U.S. Treasury securities	14,888	—	—	14,888
Corporate debt securities	—	117,432	—	117,432
Total	\$ 91,693	\$ 117,432	\$ —	\$ 209,125

  

	As of December 31, 2017			
	Level 1	Level 2	Level 3	Total
Cash and money market funds	\$ 66,392	\$ —	\$ —	\$ 66,392
U.S. Treasury securities	20,932	—	—	20,932
Corporate debt securities	—	139,011	—	139,011
Total	\$ 87,324	\$ 139,011	\$ —	\$ 226,335

## 5. ACCOUNTS RECEIVABLE

Accounts receivable consist of the following (in thousands):

	Balance as of	
	March 31, 2018	December 31, 2017
Qsymia	\$ 9,119	\$ 10,400
STENDRA/SPEDRA	2,353	1,982
	11,472	12,382
Qsymia allowance for cash discounts	(181)	(195)
Net	\$ 11,291	\$ 12,187

## 6. INVENTORIES

Inventories consist of the following (in thousands):

	Balance as of	
	March 31, 2018	December 31, 2017
Raw materials	\$ 16,802	\$ 13,663
Work-in-process	1,796	2,264
Finished goods	2,408	1,785
Inventories	\$ 21,006	\$ 17,712

Raw materials inventories consist primarily of the active pharmaceutical ingredients, or API, for Qsymia and STENDRA/SPEDRA. Inventories are stated at the lower of cost or net realizable value. Cost is determined using the first in, first out method for all inventories, which are valued using a weighted-average cost method calculated for each production batch. The Company periodically evaluates the carrying value of inventory on hand for potential excess amounts over demand using the same lower of cost or net realizable value approach as that used to value the inventory.

## 7. PREPAID EXPENSES AND OTHER CURRENT ASSETS

Prepaid expenses and other current assets consist of the following (in thousands):

	Balance as of	
	March 31, 2018	December 31, 2017
Prepaid sales and marketing expenses	\$ 1,617	\$ 1,538
Taxes receivable	2,133	1,222
Prepaid insurance	797	1,124
Other prepaid expenses and assets	1,900	3,294
Total	<u>\$ 6,447</u>	<u>\$ 7,178</u>

The amounts included in prepaid expenses and other assets consist primarily of prepayments for future services, non-trade receivables, prepaid interest and interest income receivable. These costs have been deferred as prepaid expenses and other current assets on the condensed consolidated balance sheets and will be either (i) charged to expense accordingly when the related prepaid services are rendered to the Company, or (ii) converted to cash when the receivable is collected by the Company.

## 8. NON-CURRENT ASSETS

Non-current assets consist primarily of patent acquisition and assignment costs.

## 9. ACCRUED AND OTHER LIABILITIES

Accrued and other liabilities consist of the following (in thousands):

	Balance as of	
	March 31, 2018	December 31, 2017
Accrued employee compensation and benefits	\$ 2,123	\$ 3,642
Reserve for product returns (see Note 2)	7,857	7,854
Product-related accruals (see Note 2)	5,353	5,751
Accrued interest on debt (see Note 13)	2,123	410
Accrued manufacturing costs	948	1,238
Other accrued liabilities	2,384	2,580
Total	<u>\$ 20,788</u>	<u>\$ 21,475</u>

The amounts included in other accrued liabilities consist of obligations primarily related to sales, marketing, research, clinical development, corporate activities, the STENDRA license and royalties.

## 10. NON-CURRENT ACCRUED AND OTHER LIABILITIES

Non-current accrued and other liabilities were \$0.3 million and \$0.3 million at March 31, 2018 and December 31, 2017, respectively, and were primarily comprised of deferred rent and security deposits.

## 11. DEFERRED REVENUE

Deferred revenue relates to a prepayment for future royalties on sales of SPEDRA. In the first quarter of 2018, the Company recorded \$0.3 million of revenues which had been deferred as of December 31, 2017.

## 12. LICENSE, COMMERCIALIZATION AND SUPPLY AGREEMENTS

### *MTPC*

In January 2001, the Company entered into an exclusive development, license and clinical trial and commercial supply agreement with Tanabe Seiyaku Co., Ltd., now Mitsubishi Tanabe Pharma Corporation, or MTPC, for the development and commercialization of avanafil. Under the terms of the agreement, MTPC agreed to grant an exclusive license to the Company for products containing avanafil outside of Japan, North Korea, South Korea, China, Taiwan, Singapore, Indonesia, Malaysia, Thailand, Vietnam and the Philippines. The Company agreed to grant MTPC an exclusive, royalty free license within those countries for oral products that we develop containing avanafil. The MTPC agreement contains a number of milestone payments to be made by us based on various triggering events. The term of the MTPC agreement is based on a country by country and on a product by product basis. In August 2012, the Company entered into an amendment to the agreement with MTPC that permitted the Company to manufacture the active pharmaceutical ingredient, or API, and tablets for STENDRA by itself or through third parties. In 2015, the Company transferred the manufacturing of the API and tablets for STENDRA to Sanofi. The Company maintains royalty obligations to MTPC which have been passed through to our commercialization partners.

### *Menarini*

In July 2013, the Company entered into a license and commercialization agreement, or the Menarini License Agreement, and a supply agreement, or the Menarini Supply Agreement, with the Menarini Group through its subsidiary Berlin Chemie AG, or Menarini. Under the terms of the Menarini License Agreement, Menarini received an exclusive license to commercialize and promote SPEDRA for the treatment of ED in over 40 countries, including the EU, plus Australia and New Zealand. Additionally, the Company transferred to Menarini ownership of the marketing authorization for SPEDRA in the EU for the treatment of ED, which was granted by the EC in June 2013. Under the Menarini License Agreement, the Company has and is entitled to receive potential milestone payments based on certain net sales targets, plus royalties on SPEDRA sales. Under the terms of the Menarini Supply Agreement, the Company will supply Menarini with STENDRA drug product until December 31, 2018. Menarini also has the right to manufacture STENDRA independently, provided that it continues to satisfy certain minimum purchase obligations to the Company. Following the expiration of the Menarini Supply Agreement, Menarini will be responsible for its own supply of STENDRA. Either party may terminate the Menarini Supply Agreement for the other party's uncured material breach or bankruptcy, or upon the termination of the Menarini License Agreement.

### *Sanofi*

In December 2013, the Company entered into a license and commercialization agreement, or the Sanofi License Agreement, with Sanofi. Under the terms of the Sanofi License Agreement, Sanofi received an exclusive license to commercialize and promote avanafil for therapeutic use in humans in Africa, the Middle East—Turkey and Commonwealth of Independent States, including Russia, or the Sanofi Territory. In July 2013, the Company entered into a Commercial Supply Agreement with Sanofi Chimie to manufacture and supply the API for avanafil on an exclusive basis in the United States and other territories and on a semi-exclusive basis in Europe, including the EU, Latin America and other territories. In November 2013, the Company entered into a Manufacturing and Supply Agreement with Sanofi Winthrop Industrie to manufacture and supply the avanafil tablets on an exclusive basis in the United States and other territories and on a semi exclusive basis in Europe, including the EU, Latin America and other territories. The Company has minimum annual purchase commitments under these agreements for at least the initial five-year terms.

On March 23, 2017, the Company and Sanofi entered into the Termination, Rights Reversion and Transition Services Agreement, or the Transition Agreement, effective February 28, 2017. Under the Transition Agreement, effective upon the thirtieth (30th) day following February 28, 2017, the Sanofi License Agreement terminated for all countries in the Sanofi Territory. In addition, under the Transition Agreement, Sanofi will provide the Company with certain transition services in support of ongoing regulatory approval efforts while the Company

seeks to obtain a new commercial partner or partners for the Sanofi Territory. The Company will pay certain transition service fees to Sanofi as part of the Transition Agreement.

#### *Metuchen*

On September 30, 2016, the Company entered into a license and commercialization agreement, or the Metuchen License Agreement, and a commercial supply agreement, or the Metuchen Supply Agreement, with Metuchen Pharmaceuticals LLC, or Metuchen. Under the terms of the Metuchen License Agreement, Metuchen received an exclusive license to develop, commercialize and promote STENDRA in the United States, Canada, South America and India, or the Metuchen Territory, effective October 1, 2016. The Company and Metuchen have agreed not to develop, commercialize, or in-license any other product that operates as a PDE-5 inhibitor in the Metuchen Territory for a limited time period, subject to certain exceptions. The Metuchen License Agreement will terminate upon the expiration of the last-to-expire payment obligations under the Metuchen License Agreement; upon expiration of the term of the Metuchen License Agreement, the exclusive license granted under the Metuchen License Agreement shall become fully paid-up, royalty-free, perpetual and irrevocable as to the Company but not certain trademark royalties due to MTPC.

Metuchen will obtain STENDRA exclusively from the Company for a mutually agreed term pursuant to the Metuchen Supply Agreement. Metuchen may elect to transfer the control of the supply chain for STENDRA for the Metuchen Territory to itself or its designee by assigning to Metuchen the Company's agreements with the contract manufacturer. For 2016 and each subsequent calendar year during the term of the Metuchen Supply Agreement, if Metuchen fails to purchase an agreed minimum purchase amount of STENDRA from the Company, it will reimburse the Company for the shortfall as it relates to the Company's out of pocket costs to acquire certain raw materials needed to manufacture STENDRA. Upon the termination of the Metuchen Supply Agreement (other than by Metuchen for the Company's uncured material breach or upon completion of the transfer of the control of the supply chain), Metuchen's agreed minimum purchase amount of STENDRA from the Company shall accelerate for the entire then current initial term or renewal term, as applicable. The initial term under the Metuchen Supply Agreement will be for a period of five years, with automatic renewal for successive two-year periods unless either party provides a termination notice to the other party at least two years in advance of the expiration of the then current term.

#### *Alvogen*

In September 2017, the Company entered into a license and commercialization agreement, or the Alvogen License Agreement, and a commercial supply agreement, or the Alvogen Supply Agreement, with Alvogen Malta Operations (ROW) Ltd, or Alvogen. Under the terms of the Alvogen License Agreement, Alvogen will be solely responsible for obtaining and maintaining regulatory approvals for all sales and marketing activities for Qsymia in South Korea. The Company received an upfront payment of \$2.5 million in September 2017, which was recorded in license and milestone revenue in the third quarter of 2017, and is eligible to receive additional payments upon Alvogen achieving marketing authorization, commercial launch and reaching a sales milestone. Additionally, the Company will receive a royalty on Alvogen's Qsymia net sales in South Korea. Under the Alvogen Supply Agreement, the Company will supply product to Alvogen.

### **13. LONG-TERM DEBT AND COMMITMENTS**

#### *Convertible Senior Notes Due 2020*

In May 2013, the Company closed an offering of \$220.0 million in 4.5% Convertible Senior Notes due May 2020, or the Convertible Notes. The Convertible Notes are governed by an indenture, dated May 2013 between the Company and Deutsche Bank National Trust Company, as trustee. In May 2013, the Company closed on an additional \$30.0 million of Convertible Notes upon exercise of an option by the initial purchasers of the Convertible Notes at a conversion rate of approximately \$14.86 per share. Total net proceeds from the Convertible Notes were approximately \$241.8 million. The Convertible Notes are convertible at the option of the holders under certain conditions at any time prior to the close of business on the business day immediately preceding November 1, 2019. On or after November 1, 2019, holders may convert all or any portion of their Convertible Notes at any time at their option at the conversion rate then in effect, regardless of these conditions. Subject to certain limitations, the

Company will settle conversions of the Convertible Notes by paying or delivering, as the case may be, cash, shares of its common stock or a combination of cash and shares of our common stock, at the Company's election. Interest payments are made semi-annually.

For the three months ended March 31, 2018, total interest expense related to the Convertible Notes was \$8.4 million, including amortization of \$5.1 million of the debt discount and amortization of \$273,000 of deferred financing costs. For the three months ended March 31, 2017, total interest expense related to the Convertible Notes was \$7.9 million, including amortization of \$4.7 million of the debt discount and amortization of \$247,000 of deferred financing costs.

#### *Senior Secured Notes Due 2018*

In March 2013, the Company entered into the Purchase and Sale Agreement between the Company and BioPharma Secured Investments III Holdings Cayman LP, or Biopharma, a Cayman Islands exempted limited partnership, providing for the purchase of a debt like instrument, or the Senior Secured Notes. Under the agreement, the Company received \$50 million, less \$500,000 in funding and facility payments, at the initial closing in April 2013. The scheduled quarterly payments on the Senior Secured Notes are subject to the net sales of (i) Qsymia and (ii) any other obesity agent developed or marketed by us or our affiliates or licensees. The scheduled quarterly payments, other than the payment(s) scheduled to be made in the second quarter of 2018, are capped at the lower of the scheduled payment amounts or 25% of the net sales of (i) and (ii) above. Accordingly, if 25% of the net sales is less than the scheduled quarterly payment, then 25% of the net sales is due for that quarter, with the exception of the payment(s) scheduled to be made in the second quarter of 2018, when any unpaid scheduled quarterly payments plus any accrued and unpaid make whole premiums must be paid. Any quarterly payment less than the scheduled quarterly payment amount will be subject to a make whole premium equal to the applicable scheduled quarterly payment of the preceding quarter less the actual payment made to BioPharma for the preceding quarter multiplied by 1.03. The Company may elect to pay full scheduled quarterly payments if it chooses.

For the three months ended March 31, 2018, the interest expense related to the Senior Secured Notes was \$0.1 million, including amortization of deferred financing costs of \$7,000. For the three months ended March 31, 2017, the interest expense related to the Senior Secured Notes was \$1.0 million, including amortization of deferred financing costs of \$38,000.

The following table summarizes information on the debt (in thousands):

	March 31, 2018
Convertible Senior Notes due 2020	\$ 250,000
Senior Secured Notes due 2018	1,597
	251,597
Less: Debt issuance costs	(761)
Less: Discount on convertible senior notes	(14,329)
	236,507
Less: Current portion	(836)
Long-term debt, net of current portion	\$ 235,671

Future estimated payments as of March 31, 2018 are as follows:

2018	\$ 12,950
2019	11,250
2020	256,250
Total	280,450
Less: Interest portion	(28,853)
Senior Secured Notes	\$ 251,597

As a condition of FDA granting approval to commercialize Qsymia in the U.S., the Company agreed to complete certain post-marketing requirements. One requirement was to perform a cardiovascular outcomes trial, or CVOT, on Qsymia. The cost of a CVOT is estimated to be between \$180 million and \$220 million incurred over a period of approximately five years. The Company is working with FDA to significantly reduce or remove the requirements of the CVOT. To date, the Company has not incurred expenses related to the CVOT.

#### 14. NET INCOME (LOSS) PER SHARE

The Company computes basic net income (loss) per share applicable to common stockholders based on the weighted average number of common shares outstanding during the applicable period. Diluted net income per share is based on the weighted average number of common and common equivalent shares, which represent shares that may be issued in the future upon the exercise of outstanding stock options or upon a net share settlement of the Company's Convertible Notes. Common share equivalents are excluded from the computation in periods in which they have an anti-dilutive effect. Stock options for which the price exceeds the average market price over the period have an anti-dilutive effect on net income per share and, accordingly, are excluded from the calculation. The triggering conversion conditions that allow holders of the Convertible Notes to convert have not been met. If such conditions are met and the note holders opt to convert, the Company may choose to pay in cash, common stock, or a combination thereof; however, if this occurs, the Company has the intent and ability to net share settle this debt security; thus the Company uses the treasury stock method for earnings per share purposes. Due to the effect of the capped call instrument purchased in relation to the Convertible Notes, there would be no net shares issued until the market value of the Company's stock exceeds \$20 per share, and thus no impact on diluted net income per share. Further, when there is a net loss, potentially dilutive common equivalent shares are not included in the calculation of net loss per share since their inclusion would be anti-dilutive.

As the Company recognized a net loss for each of the three-month periods ended March 31, 2018 and 2017, all potential common equivalent shares were excluded for these periods as they were anti-dilutive. Awards and options which were not included in the computation of diluted net loss per share because the effect would be anti-dilutive were 16,729,000 and 12,731,000, respectively, for the three months ended March 31, 2018 and 2017.

#### 15. INCOME TAXES

For the three months ended March 31, 2018, the Company recorded a provision for income taxes of \$12,000. For the three months ended March 31, 2017, the Company recorded a benefit from taxes of \$12,000. The benefit and provision for income taxes for each of the periods was primarily comprised of state taxes during the period.

The Company periodically evaluates the realizability of its net deferred tax assets based on all available evidence, both positive and negative. The realization of net deferred tax assets is dependent on the Company's ability to generate sufficient future taxable income during periods prior to the expiration of tax attributes to fully utilize these assets. The Company weighed both positive and negative evidence and determined that there is a continued need for a full valuation allowance on its deferred tax assets in the United States as of March 31, 2018. Should the Company determine that it would be able to realize its remaining deferred tax assets in the foreseeable future, an adjustment to its remaining deferred tax assets would cause a material increase to income in the period such determination is made.

As of March 31, 2018, the Company's unrecognized tax benefit is related to the federal and California research and development credits which result in an unrecognized tax benefit balance of \$121,000. The Company does not expect to have any other significant changes to unrecognized tax benefits through the end of the fiscal year. Because of the Company's history of tax losses, certain tax years remain open to tax audit. The Company's policy is to recognize interest and penalties related to uncertain tax positions (if any) as a component of the income tax provision.

On December 22, 2017, the Tax Cuts and Jobs Act was signed into law. Among other changes is an interest expense deduction limitation effective January 1, 2018. Under the guidance of Staff Accounting Bulletin 118, the Company has estimated an additional \$12.1 million non-deductible accrued interest expense in the forecasted taxable income computation, for which the accounting is incomplete but a reasonable estimate can be determined. Due to the overall taxable loss and valuation allowance position, there would be no material provision impact.

## 16. LEGAL MATTERS

### *Shareholder Lawsuit*

On March 27, 2014, Mary Jane and Thomas Jasin, who purport to be purchasers of VIVUS common stock, filed an Amended Complaint in Santa Clara County Superior Court alleging securities fraud against the Company and three of its former officers and directors. In that complaint, captioned *Jasin v. VIVUS, Inc.*, Case No. 114-cv-261427, plaintiffs asserted claims under California’s securities and consumer protection securities statutes. Plaintiffs alleged generally that defendants misrepresented the prospects for the Company’s success, including with respect to the launch of Qsymia, while purportedly selling VIVUS stock for personal profit. Plaintiffs alleged losses of “at least” \$2.8 million, and sought damages and other relief. On July 18, 2014, the same plaintiffs filed a complaint in the United States District Court for the Northern District of California, captioned *Jasin v. VIVUS, Inc.*, Case No. 5:14-cv-03263. The Jasins’ federal complaint alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended, based on facts substantially similar to those alleged in their state court action. On September 15, 2014, pursuant to an agreement between the parties, plaintiffs voluntarily dismissed their state court action with prejudice. Defendants moved to dismiss the federal action and moved to dismiss again after plaintiffs amended their complaint to include additional factual allegations and to add seven new claims under California law. The court granted the latter motion on June 18, 2015, dismissing the seven California claims with prejudice and dismissing the two federal claims with leave to amend. Plaintiffs filed a Second Amended Complaint on August 17, 2015. Defendants moved to dismiss that complaint as well. On April 19, 2016, the court granted defendants’ motion to dismiss with prejudice and entered judgment in favor of defendants. Plaintiffs filed a notice of appeal to the Ninth Circuit Court of Appeals on May 18, 2016. The Ninth Circuit issued a decision on January 16, 2018, affirming the district court’s dismissal of the action. The deadlines for Plaintiffs to seek rehearing in the Ninth Circuit and to file a petition for certiorari in the Supreme Court have now expired and the matter is concluded.

### *Qsymia ANDA Litigation*

On May 7, 2014, the Company received a Paragraph IV certification notice from Actavis Laboratories FL indicating that it filed an abbreviated new drug application, or ANDA, with the U.S. Food and Drug Administration, or FDA, requesting approval to market a generic version of Qsymia. The initial notice alleged that six patents listed for Qsymia in the FDA Orange Book at the time the notice was received are invalid, unenforceable and/or will not be infringed by the manufacture, use, sale or offer for sale of a generic form of Qsymia as described in their ANDA. On June 12, 2014, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Actavis Laboratories FL, Inc., Actavis, Inc., and Actavis PLC, collectively referred to as Actavis. Additional patents covering Qsymia have been issued since May 2014 and after receiving Paragraph IV certification notices from Actavis with respect to those patents, the Company filed additional lawsuits against Actavis to include these additional patents in the litigation. On August 17, 2015, the lawsuits against Actavis were consolidated into a single suit (Case No. 14-3786 (SRC)(CLW)).

On June 29, 2017, the Company entered into a settlement agreement with Actavis resolving the suit against Actavis. On July 5, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

On March 5, 2015, the Company received a Paragraph IV certification notice from Teva Pharmaceuticals USA, Inc. indicating that it filed an ANDA with FDA, requesting approval to market a generic version of Qsymia and contending that patents listed for Qsymia in the Orange Book at the time of the notice are invalid, unenforceable and/or will not be infringed by the manufacture, use or sale of a generic form of Qsymia as described in their ANDA. On April 15, 2015, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Teva Pharmaceutical USA, Inc. and Teva Pharmaceutical Industries, Ltd., collectively referred to as Teva. A second Paragraph IV certification notice was received from Teva with respect to patents covering Qsymia that issued after March 2015, and the Company filed an additional lawsuit against Teva to include these additional patents in the litigation. The lawsuits against Teva were consolidated into a single suit (Case No. 15-2693 (SRC)(CLW)). On September 27, 2016, Dr. Reddy’s Laboratories, S.A. and Dr. Reddy’s Laboratories, Inc., collectively referred to as DRL, were substituted for Teva as defendants in the lawsuits.

On August 28, 2017, the Company entered into a settlement agreement with DRL resolving the suit against DRL. On September 6, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the

suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

The settlements resolve all patent litigation brought by VIVUS against generic pharmaceutical companies that have filed ANDAs seeking approval to market generic versions of Qsymia. The settlement agreement with Actavis will permit Actavis to begin selling a generic version of Qsymia on December 1, 2024, or earlier under certain circumstances. The settlement with DRL will permit DRL to begin selling a generic version of Qsymia on June 1, 2025, or earlier under certain circumstances.

#### *STENDRA ANDA Litigation*

On June 20, 2016, the Company received a Paragraph IV certification notice from Hetero USA, Inc. and Hetero Labs Limited, collectively referred to as Hetero, indicating that it filed an ANDA with FDA, requesting approval to market a generic version of STENDRA and contending that patents listed for STENDRA in the Orange Book at the time of the notice are invalid, unenforceable and/or will not be infringed by the manufacture, use or sale of a generic form of STENDRA as described in their ANDA. On July 27, 2016, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Hetero (Case No. 16-4560 (KSH)(CLW)). On January 3, 2017, we entered into a settlement agreement with Hetero. Under the settlement agreement, Hetero was granted a license to manufacture and commercialize the generic version of STENDRA described in its ANDA filing in the United States as of the date that is the later of (a) October 29, 2024, which is 180 days prior to the expiration of the last to expire of the patents-in-suit, or (b) the date that Hetero obtains final approval from FDA of the Hetero ANDA. The settlement agreement provides for a full settlement of all claims that were asserted in the suit.

The Company is not aware of any other asserted or unasserted claims against it where it believes that an unfavorable resolution would have an adverse material impact on the operations or financial position of the Company.

## **17. SUBSEQUENT EVENTS**

In April 2018, the Company entered into a stock purchase agreement with Willow Biopharma Inc., or Willow, and its shareholders, under which the Company agreed to acquire all of the equity interest of Willow in exchange for warrants to purchase up to 3.57 million shares of the Company's common stock with a per share exercise price of \$0.37, the closing price of the Company's common stock on the date of grant. With this acquisition, the Company announced the addition of three new members to its senior leadership team. John Amos, who previously served as the Executive Chairman of Willow, has been named the new Chief Executive Officer of VIVUS and a member of the VIVUS Board of Directors. Kenneth Suh will remain as President and Chief Executive Officer of Willow. M. Scott Oehrlein, who served as Chief Operations Officer of Willow, has been named to the newly created position of Chief Operations Officer of VIVUS.

In April 2018, the Company entered into an asset purchase agreement with Jansen Pharmaceuticals, Inc. to acquire all product rights for PANCREAZE® (pancrelipase) in the United States and PANCREAZE® MT in Canada for \$135 million in cash. PANCREAZE is a pancreatic enzyme preparation specifically indicated for the treatment of exocrine pancreatic insufficiency due to cystic fibrosis or other conditions. The transaction is expected to close before the end of the second quarter of 2018, pending expiration or earlier termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the satisfaction of other customary closing conditions.

Also in April 2018, the Company entered into a note purchase agreement with affiliates of Athyrium Capital Management for the issuance and sale of up to \$110 million of 10.375% senior secured notes due 2024 to be issued substantially concurrently with the consummation of the PANCREAZE acquisition, or the Note Purchase Agreement. The Note Purchase Agreement also allows up to an additional \$10 million of 10.375% senior secured notes due 2024 to be issued at the Company's option within 12 months of the initial issue date, subject to certain conditions. Additionally, the Note Purchase Agreement provides for the issuance of warrants to purchase up to 3.3 million shares of the Company's common stock, to be issued concurrently with the issuance of the initial notes. The Note Purchase Agreement contains customary representations, warranties, covenants, conditions and indemnities. Concurrently with the issuance of the senior secured notes, the Company will repurchase Convertible Notes held by

Athyrium, with a face value of \$60 million, for \$51 million plus accrued interest. The issuance of the notes and the warrants is conditioned upon, among other things, the satisfaction of the closing conditions under the PANCREAZE Asset Purchase Agreement or the consummation of the transactions contemplated thereunder.

## ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

This Management's Discussion and Analysis of Financial Condition and Results of Operations and other parts of this Quarterly Report on Form 10-Q contain "forward looking" statements that involve risks and uncertainties. These statements typically may be identified by the use of forward-looking words or phrases such as "may," "believe," "expect," "forecast," "intend," "anticipate," "predict," "should," "planned," "likely," "opportunity," "estimated," and "potential," the negative use of these words or other similar words. All forward-looking statements included in this document are based on our current expectations, and we assume no obligation to update any such forward-looking statements. The Private Securities Litigation Reform Act of 1995 provides a "safe harbor" for such forward-looking statements. In order to comply with the terms of the safe harbor, we note that a variety of factors could cause actual results and experiences to differ materially from the anticipated results or other expectations expressed in such forward-looking statements. The risks and uncertainties that may affect the operations, performance, development, and results of our business include but are not limited to:

*Risks and uncertainties related to Qsymia® (phentermine and topiramate extended release):*

- the timing of initiation and completion of the post-approval clinical studies required as part of the approval of Qsymia by the U.S. Food and Drug Administration, or FDA;
- the response from FDA to any data and/or information relating to post-approval clinical studies required for Qsymia;
- our ability to work with FDA to significantly reduce or remove the requirements of the clinical post-approval cardiovascular outcomes trial, or CVOT;
- the impact of the indicated uses and contraindications contained in the Qsymia label and the Risk Evaluation and Mitigation Strategy, or REMS, requirements;
- our ability to sell through the Qsymia retail pharmacy network;
- whether the Qsymia retail pharmacy network will simplify and reduce the prescribing burden for physicians, improve access and reduce waiting times for patients seeking to initiate therapy with Qsymia;
- that we may be required to provide further analysis of previously submitted clinical trial data;
- our dialog with the European Medicines Agency, or EMA, relating to the U.S.-based CVOT for Qsymia, and the resubmission of an application for the grant of a marketing authorization to the EMA, the timing of such resubmission, if any, the results of any required CVOT, the assessment by the EMA of the application for marketing authorization, and their agreement with the data from any required CVOT;
- our, or our current or potential partners', ability to successfully seek and gain approval for Qsymia in territories outside the U.S. and EU;
- whether healthcare providers, payors and public policy makers will recognize the significance of the American Medical Association officially recognizing obesity as a disease, or the new American Association of Clinical Endocrinologists guidelines;
- our, or our current or potential partners', ability to successfully commercialize Qsymia including risks and uncertainties related to expansion to retail distribution, the broadening of payor reimbursement, the expansion of Qsymia's primary care presence, and the outcomes of our discussions with pharmaceutical companies and our strategic and franchise-specific pathways for Qsymia;
- our ability to focus our promotional efforts on health-care providers and on patient education that, along with increased access to Qsymia and ongoing improvements in reimbursement, will result in the accelerated adoption of Qsymia;
- our ability to ensure that the entire supply chain for Qsymia efficiently and consistently delivers Qsymia to our customers and partners;
- our ability to accurately forecast Qsymia demand;
- the number of Qsymia prescriptions dispensed;
- the impact of promotional programs for Qsymia on our net product revenue and net income (loss) in future periods;

*Risks and uncertainties related to STENDRA® (avanafil) or SPEDRA™ (avanafil):*

- our ability to manage the supply chain for STENDRA/SPEDRA for our current or potential collaborators;
- risks and uncertainties related to the timing, strategy, tactics and success of the launches and commercialization of STENDRA/SPEDRA by our current or potential collaborators;
- our ability to successfully complete on acceptable terms and on a timely basis, avanafil partnering discussions for territories under our license with Mitsubishi Tanabe Pharma Corporation in which we do not have a commercial collaboration;
- Sanofi Chimie's ability to manufacture avanafil active pharmaceutical ingredient and Sanofi Winthrop Industrie's ability to manufacture avanafil tablets;
- the ability of our partners to maintain regulatory approvals to manufacture and adequately supply our products to meet demand;

*Risks and uncertainties related to our business:*

- our history of losses and variable quarterly results;
- substantial competition;
- our ability to minimize expenses that are not essential to expanding the use of STENDRA/SPEDRA and Qsymia or that are not related to product development;
- risks related to our ability to protect our intellectual property and litigation in which we are involved or may become involved;
- uncertainties of government or third-party payor reimbursement;
- our reliance on sole-source suppliers, third parties and our collaborative partners;
- our ability to successfully develop or acquire a proprietary formulation of tacrolimus as a precursor to initiating our clinical development process;
- our ability to identify and acquire development and cash flow generating assets;
- risks related to the failure to obtain or retain federal or state-controlled substances registrations and noncompliance with Drug Enforcement Administration, or DEA, or state controlled substances regulations;
- risks related to the failure to obtain FDA or foreign authority clearances or approvals and noncompliance with FDA or foreign authority regulations;
- our ability to develop a proprietary formulation and to demonstrate through clinical testing the quality, safety, and efficacy of our current and future investigational drug candidates;
- the timing of initiation and completion of clinical trials and submissions to U.S. and foreign authorities;
- the results of post-marketing studies are not favorable;
- compliance with post-marketing regulatory standards, post-marketing obligations or pharmacovigilance rules is not maintained;
- the volatility and liquidity of the financial markets;
- our liquidity and capital resources;
- our expected future revenues, operations and expenditures;
- potential change in our business strategy to enhance long-term stockholder value;
- our ability to address or potentially reduce our outstanding balance of the \$250 million of convertible notes due in 2020;
- our ability to complete the PANCREAZE® acquisition;
- the impact of recent changes to our Board of Directors and senior management team;
- our ability to successfully integrate the new senior management team; and
- other factors that are described from time to time in our periodic filings with the Securities and Exchange Commission, or the SEC, including those set forth in this filing as "Item 1A. Risk Factors."

When we refer to “we,” “our,” “us,” the “Company” or “VIVUS” in this document, we mean the current Delaware corporation, or VIVUS, Inc., and its California predecessor, as well as all of our consolidated subsidiaries.

All percentage amounts and ratios were calculated using the underlying data in thousands. Operating results for the three months ended March 31, 2018 are not necessarily indicative of the results that may be expected for the full fiscal year or any future period.

You should read the following management’s discussion and analysis of our financial condition and results of operations in conjunction with our audited consolidated financial statements and related notes thereto included as part of our Annual Report on Form 10-K for the year ended December 31, 2017, as filed with the SEC on March 14, 2018 and as amended by the Form 10-K/A filed with the SEC on April 26, 2018, and other disclosures (including the disclosures under “Part II. Item 1A. Risk Factors”) included in this Quarterly Report on Form 10-Q. Our unaudited condensed consolidated financial statements have been prepared in accordance with U.S. generally accepted accounting principles and are presented in U.S. dollars.

## OVERVIEW

VIVUS is a specialty pharmaceutical company with two approved therapies and one product candidate in active clinical development. Qsymia® (phentermine and topiramate extended release) is approved by FDA for chronic weight management. STENDRA® (avanafil) is approved by FDA for erectile dysfunction, or ED, and by the EC under the trade name SPEDRA, for the treatment of ED in the EU. Tacrolimus is in active clinical development and is being studied in patients with pulmonary arterial hypertension, or PAH.

In April 2018, we entered into an agreement to acquire the U.S. and Canadian commercial rights for PANCREAZE® (pancrelipase). The closing of this acquisition is subject to governmental reviews and is expected to close before the end of the second quarter of 2018. PANCREAZE is indicated for the treatment of exocrine pancreatic insufficiency due to cystic fibrosis or other conditions.

### *Business Strategy Review*

In 2016, we initiated a business strategy review to maximize long-term stockholder value. The result of this review was for us to focus our efforts in three areas moving forward: (i) build our portfolio of development and cash flow generating assets, (ii) maximize the value of and monetizing our legacy assets (Qsymia and STENDRA/SPEDRA), and (iii) identify opportunities to address our outstanding debt balances.

In 2017, we acquired tacrolimus and ascomycin, both compounds to be utilized for the treatment of PAH, we licensed Qsymia in South Korea, and we reacquired the rights for SPEDRA in Africa, the Middle East, Turkey, and the Commonwealth of Independent States, or CIS, including Russia.

Early in 2018, we announced that we would focus our strategy on building a portfolio of cash flow generating assets to leverage our expertise in commercializing specialty pharma assets. In May 2018, we announced the first acquisition under this strategy as we entered into an asset purchase agreement with Jansen Pharmaceuticals, Inc. to acquire all product rights for PANCREAZE® (pancrelipase) in the United States and PANCREAZE® MT in Canada for \$135 million in cash. PANCREAZE is a pancreatic enzyme preparation consisting of pancrelipase, an extract derived from porcine pancreatic glands, as well as other enzyme classes, including porcine-derived lipases, proteases, and amylases. The pancreatic enzymes in PANCREAZE act like digestive enzymes physiologically secreted by the pancreas. PANCREAZE is specifically indicated for the treatment of exocrine pancreatic insufficiency due to cystic fibrosis or other conditions. We believe we can support PANCREAZE in the U.S. market with a focused selling effort that leverages our existing U.S. field force and internal commercial infrastructure. We expect to build a small commercial presence in Canada to support PANCREAZE MT, the trade name for pancrelipase in Canada. We expect to close this transaction before the end of the second quarter of 2018, pending expiration or earlier termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the satisfaction of other customary closing conditions.

Another key strategy for 2018 was the recruitment and hiring of a permanent full-time CEO. In April 2018, we announced the acquisition of Willow Biopharma Inc., or Willow. With this acquisition, we announced the addition of three new members of our senior leadership team. John Amos has been named our new Chief Executive Officer and a member of the VIVUS Board of Directors. Kenneth Suh will continue as President and Chief Executive Officer of Willow. M. Scott Oehrlein has been named to the newly created position of Chief Operations

Officer of VIVUS. These three individuals have a strong track record of building successful cash-flow positive businesses through product acquisition. In combination with the current members of the senior leadership team, we believe that we are well positioned to continue to successfully execute on our 2018 business plan.

In April 2018, we entered into a note purchase agreement with affiliates of Athyrium Capital Management for the issuance and sale of up to \$110 million of 10.375% senior secured notes due 2024 to be issued substantially concurrently with the consummation of the PANCREAZE acquisition, or the Note Purchase Agreement. The Note Purchase Agreement also allows up to an additional \$10 million of 10.375% senior secured notes due 2024 to be issued at our option within 12 months of the initial issue date, subject to certain conditions. Additionally, the Note Purchase Agreement provides for the issuance of warrants to purchase up to 3.3 million shares of our common stock, to be issued concurrently with the issuance of the initial notes. The Note Purchase Agreement contains customary representations, warranties, covenants, conditions and indemnities. Concurrently with the issuance of the senior secured notes, we will repurchase Convertible Notes held by Athyrium, with a face value of \$60 million, at a discount to par plus accrued interest. The issuance of the notes and the warrants is conditioned upon, among other things, the satisfaction of the closing conditions under the PANCREAZE Asset Purchase Agreement or the consummation of the transactions contemplated thereunder. We continue our evaluation of alternatives for addressing our remaining convertible notes due in May 2020, which will total \$190 million upon closing of the repurchase from Athyrium.

### **Commercial Products**

#### ***Qsymia***

FDA approved Qsymia in July 2012, as an adjunct to a reduced calorie diet and increased physical activity for chronic weight management in adult obese or overweight patients in the presence of at least one weight related comorbidity, such as hypertension, type 2 diabetes mellitus or high cholesterol, or dyslipidemia. Qsymia incorporates a proprietary formulation combining low doses of the active ingredients from two previously approved drugs, phentermine and topiramate. Although the exact mechanism of action is unknown, Qsymia is believed to suppress appetite and increase satiety, or the feeling of being full, the two main mechanisms that impact eating behavior.

We commercialize Qsymia in the U.S. through a small specialty sales force who promote Qsymia to physicians. Our sales efforts are focused on maintaining a commercial presence with high volume prescribers of anti-obesity products. Our marketing efforts have focused on rolling out unique programs to encourage targeted prescribers to gain more experience with Qsymia with their obese or overweight patient population. We continue to invest in digital media in order to amplify our messaging to information-seeking consumers. The digital messaging encourages those consumers most likely to take action to speak with their physicians about obesity treatment options. We believe our enhanced digital strategies deliver clear and compelling communications to potential patients. We utilize a patient savings plan to further drive Qsymia brand preference at the point of prescription and to encourage long-term use of the brand.

In September 2017, we entered into a license and commercialization agreement, or the Alvogen License Agreement, and a commercial supply agreement, or the Alvogen Supply Agreement, with Alvogen Malta Operations (ROW) Ltd, or Alvogen. Under the terms of the Alvogen License Agreement, Alvogen will be solely responsible for obtaining and maintaining regulatory approvals for all sales and marketing activities for Qsymia in South Korea. We received an upfront payment of \$2.5 million in September 2017 and are eligible to receive additional payments upon Alvogen achieving marketing authorization, commercial launch and reaching a sales milestone. Additionally, we will receive a royalty on Alvogen's Qsymia net sales in South Korea. Under the Alvogen Supply Agreement, the Company will supply product to Alvogen.

#### ***STENDRA/SPEDRA***

STENDRA is an oral phosphodiesterase type 5, or PDE5, inhibitor that we have licensed from Mitsubishi Tanabe Pharma Corporation, or MTPC. FDA approved STENDRA in April 2012 for the treatment of ED in the United States. In June 2013, the EC adopted a decision granting marketing authorization for SPEDRA, the approved trade name for avanafil in the EU, for the treatment of ED in the EU.

In July 2013, we entered into a license and commercialization agreement, or the Menarini License Agreement, with the Menarini Group, through its subsidiary Berlin Chemie AG, or Menarini, under which Menarini

received an exclusive license to commercialize and promote SPEDRA for the treatment of ED in over 40 countries, including the EU, Australia and New Zealand. Menarini commenced its commercialization launch of the product in the EU in early 2014. As of the date of this filing, SPEDRA is commercially available in 31 countries within the territory granted to Menarini pursuant to its license and commercialization agreement. In addition, Menarini licensed rights directly from MTPC to commercialize avanafil in certain Asian territories. We are entitled to receive potential milestone payments based on certain net sales targets, plus royalties on SPEDRA sales. Menarini will also reimburse us for payments made to cover various obligations to MTPC during the term of the Menarini License Agreement. Menarini obtains SPEDRA exclusively from us.

In September 2016, we entered into a license and commercialization agreement, or the Metuchen License Agreement, and a commercial supply agreement, or the Metuchen Supply Agreement, with Metuchen Pharmaceuticals LLC, or Metuchen. Under the terms of the Metuchen License Agreement, Metuchen received an exclusive license to develop, commercialize and promote STENDRA in the United States, Canada, South America and India, or the Metuchen Territory, effective October 1, 2016. Metuchen will reimburse us for payments made to cover royalty and milestone obligations to MTPC during the term of the Metuchen License Agreement, but will otherwise owe us no future royalties. Metuchen obtains STENDRA exclusively from us.

We are currently in discussions with potential collaboration partners to develop, market and sell STENDRA for territories in which we do not currently have a commercial collaboration, including Africa, the Middle East, Turkey, the CIS, including Russia, Mexico and Central America.

### ***Development Program***

#### ***Pulmonary Arterial Hypertension - Tacrolimus***

PAH is a chronic, life-threatening disease characterized by elevated blood pressure in the pulmonary arteries, which are the arteries between the heart and lungs, due to pathologic proliferation of epithelial and vascular smooth muscle cells in the lining of these blood vessels and excess vasoconstriction. Pulmonary blood pressure is normally between 8 and 20 mmHg at rest as measured by right heart catheterization. In patients with PAH, the pressure in the pulmonary artery is greater than 25 mmHg at rest or 30 mmHg during physical activity. These high pressures make it difficult for the heart to pump blood through the lungs to be oxygenated.

The current medical therapies for PAH involve endothelin receptor antagonists, PDE5 inhibitors, prostacyclin analogues, selective prostaglandin I<sub>2</sub> receptor agonists, and soluble guanylate cyclase stimulators, which aim to reduce symptoms and improve quality of life. All currently approved products treat the symptoms of PAH, but do not address the underlying disease. We believe that tacrolimus can be used to enhance reduced bone morphogenetic protein receptor type 2, or BMPR2, signaling that is prevalent in PAH patients and may therefore address a fundamental cause of PAH.

The prevalence of PAH varies among specific populations, but it is estimated at between 15 and 50 cases per million adults. PAH usually develops between the ages of 20 and 60 but can occur at any age, with a mean age of diagnosis around 45 years. Idiopathic PAH is the most common type, constituting approximately 40% of the total diagnosed PAH cases, and occurs two to four times more frequently in females.

On January 6, 2017, we entered into a Patent Assignment Agreement with Selten Pharma, Inc., or Selten, whereby we received exclusive, worldwide rights for the development and commercialization of BMPR2 activators for the treatment of PAH and related vascular diseases. As part of the agreement, Selten assigned to us its license to a group of patents owned by the Board of Trustees of the Leland Stanford Junior University, or Stanford, which cover uses of tacrolimus and ascomycin to treat PAH. Under this agreement, we paid Selten an upfront payment of \$1.0 million, and we will pay additional milestone payments based on global development status and future sales milestones, as well as tiered royalty payments on future sales of these compounds. The total potential milestone payments are \$39.0 million to Selten. We have assumed full responsibility for the development and commercialization of the licensed compounds for the treatment of PAH and related vascular diseases.

In October 2017, we held a pre-IND meeting with FDA for our proprietary formulation of tacrolimus for the treatment of PAH. FDA addressed our questions related to preclinical, nonclinical and clinical data and the

planned design of clinical trials of tacrolimus in class III and IV PAH patients, and clarified the requirements needed to file an IND to initiate a clinical trial in this indication. As discussed with FDA, we currently intend to design and conduct clinical trials that could qualify for Fast Track and/or Breakthrough Therapy designation.

Tacrolimus for the treatment of PAH has received Orphan Drug Designation from FDA in the United States and the European Medicines Agency in the EU. We are focusing on the development of a proprietary oral formulation of tacrolimus to be used in a clinical development program and for commercial use. We anticipate filing an IND with FDA and completing the development of our proprietary formulation of tacrolimus in 2018.

## **CRITICAL ACCOUNTING POLICIES AND ESTIMATES**

The discussion and analysis of our financial condition and results of operations are based upon our unaudited condensed consolidated financial statements, which have been prepared in accordance with accounting principles generally accepted in the U.S. The preparation of these financial statements requires us to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues, expenses and related disclosures. On an ongoing basis, we evaluate our estimates, including those related to available-for-sale securities, research and development expenses, income taxes, inventories, revenues, including revenues from multiple-element arrangements, contingencies and litigation and share-based compensation. We base our estimates on historical experience, information received from third parties and on various market specific and other relevant assumptions that are believed to be reasonable under the circumstances, the results of which form the basis for making judgments about the carrying values of assets and liabilities that are not readily apparent from other sources. Actual results may differ significantly from these estimates under different assumptions or conditions.

Our significant accounting policies are more fully described in Note 1 to our audited consolidated financial statements and in “Management’s Discussion and Analysis of Financial Condition and Results of Operations — Critical Accounting Policies and Estimates” contained in our Annual Report on Form 10-K, or our Annual Report, as filed with the SEC on March 14, 2018. There has been one significant change in our critical accounting policies during the three months ended March 31, 2018, as outlined below:

### *Revenue Recognition*

For all revenue transactions, we evaluate our contracts with our customers to determine revenue recognition using the following five-step model:

- 1) We identify the contract(s) with a customer
- 2) We identify the performance obligations in the contract
- 3) We determine the transaction price
- 4) We allocate the transaction price to the identified performance obligations
- 5) We recognize revenue when (or as) the entity satisfies a performance obligation

### *Product Revenue:*

Product revenue is recognized at the time of shipment at which time we have satisfied our performance obligation. Product revenue is recognized net of consideration paid to our customers, wholesalers and certified pharmacies. Such consideration is for services rendered by the wholesalers and pharmacies in accordance with the wholesalers and certified pharmacy services network agreements, and includes a fixed rate per prescription shipped and monthly program management and data fees. These services are not deemed sufficiently separable from the customers’ purchase of the product; therefore, they are recorded as a reduction of revenue at the time of revenue recognition.

Other product revenue allowances include a reserve for estimated product returns, certain prompt pay discounts and allowances offered to our customers, program rebates and chargebacks. These product revenue allowances are recognized as a reduction of revenue at the date at which the related revenue is recognized. We also offer discount programs to patients. Calculating certain of these items involves estimates and judgments based on sales or invoice data, contractual terms, utilization rates, new information regarding changes in these programs’ regulations and guidelines that would impact the amount of the actual rebates or chargebacks. We review the adequacy of product revenue allowances on a quarterly basis. Amounts accrued for product revenue allowances are

adjusted when trends or significant events indicate that adjustment is appropriate and to reflect actual experience. See Note 9 for product reserve balances.

#### *Change in Accounting Estimate in 2017*

We ship units of Qsymia through a distribution network that includes certified retail pharmacies. We began shipping Qsymia in September 2012 and grant rights to our customers to return unsold product from six months prior to and up to 12 months subsequent to product expiration. This has resulted in a potential return period of from 24 to 36 months depending on the ship date of the product. As we had no previous experience in selling Qsymia and given the lengthy return period, we were not initially able to reliably estimate expected returns of Qsymia at the time of shipment, which was required by the accounting literature at the time, and therefore recognized revenue when units were dispensed to patients through prescriptions, at which point the product was not subject to return, or when the expiration period had ended.

Beginning in the first quarter of 2017, with 48 months of returns experience, we believed that we had sufficient data and experience from selling Qsymia to reliably estimate expected returns. Therefore, beginning in the first quarter of 2017, under the then relevant accounting literature, we began recognizing revenue from the sales of Qsymia upon shipment and recording a reserve for expected returns at the time of shipment.

In accordance with this change in accounting estimate, in the first quarter of 2017 we recognized a one-time adjustment relating to products that had been previously shipped, consisting of \$17.9 million of gross revenues, adjusted for an expected returns reserve of \$5.7 million and estimated gross-to-net charges of \$4.9 million, for a net impact of \$7.3 million in revenues. We also recorded increased cost of goods sold of \$0.6 million and marketing expense of \$0.7 million associated with the change in accounting estimate. The increase in net product revenue resulted in a decrease in net loss of \$6.0 million or \$0.06 per share in the first quarter of 2017.

#### *Supply Revenue:*

We produce STENDRA or SPEDRA through a contract manufacturing partner and then sell it to our commercialization partners. We are the primary responsible party in the commercial supply arrangements and bear significant risk in the fulfillment of the obligations, including risks associated with manufacturing, regulatory compliance and quality assurance, as well as inventory, financial and credit loss. As such, we recognize supply revenue on a gross basis as the principal party in the arrangements. We recognize supply revenue at the time of shipment and, in the unusual case where the product does not meet contractually-specified product dating criteria at the time of shipment to the partner, we record a reserve for estimated product returns. There are no such reserves as of March 31, 2018.

#### *License and Milestone Revenue*

License and milestone revenues related to arrangements, usually license and/or supply agreements, entered into by us are recognized by following the five-step process outlined above. The allocation and timing of recognition of such revenue will be determined by that process and the amounts recognized and the timing of that recognition may not exactly follow the wording of the agreement as the amount allocated following the accounting analysis of the agreement may differ and the timing of recognition of a significant performance obligation may predate the contractual date.

#### *Royalty Revenue*

We rely on data provided by our collaboration partners in determining our contractually-based royalty revenue. Such data includes accounting estimates and reports for various discounts and allowances, including product returns. We record royalty revenues based on the best data available and make any adjustments to such revenues as such information becomes available.

## RESULTS OF OPERATIONS

### Revenues

(in thousands, except for percentages)	Three Months Ended March 31,		% Change
	2018	2017	Increase/ (Decrease) 2018 vs 2017
<b>Revenue:</b>			
Net product revenue	\$ 9,632	\$ 17,620	(45)%
License and milestone revenue	—	5,000	(100)%
Supply revenue	1,683	3,812	(56)%
Royalty revenue	585	580	1 %
Total revenue	<u>\$ 11,900</u>	<u>\$ 27,012</u>	(56)%

#### Net product revenue

Net product revenue for the three months ended March 31, 2017 includes a one-time adjustment of \$7.3 million related to shipments, which had previously been deferred due to our change to the “sell-in” revenue recognition methodology. In the first quarters of 2018 and 2017, we shipped approximately 83,000 units and 89,000 units, respectively, of Qsymia to wholesalers, excluding the one-time adjustment for the change in accounting estimate in the first quarter of 2017. Approximately 92,000 and 102,000 Qsymia prescriptions were dispensed in the first quarters of 2018 and 2017, respectively. The change in the timing of when we recognize revenue could result in higher volatility of Qsymia sales compared to those historically reported. We expect Qsymia net product revenue in 2018 to decrease from 2017 levels due to market conditions.

#### License and milestone revenue

There was no license and milestone revenue for the three months ended March 31, 2018. License and milestone revenue for the three months ended March 31, 2017 consisted of a one-time \$5.0 million payment received for a license to certain clinical and non-clinical data related to phentermine. License and milestone revenues are dependent on the timing of entering into new collaborations and the timing of our collaborators meeting certain milestone events. As a result, our license and milestone revenue will fluctuate materially between periods.

#### Supply revenue

The decrease in supply revenue in 2018 as compared to 2017 is due to the timing of orders from our commercialization partners. We supply STENDRA/SPEDRA to our collaborators partners on a cost-plus basis. The variations in supply revenue are a result of the timing of orders placed by our partners and may or may not reflect end user demand for STENDRA/SPEDRA. The timing of purchases by our commercialization partners will be affected by, among other items, their minimum purchase commitments, end user demand, and distributor inventory levels. As a result, supply revenue has and will continue to fluctuate materially between reporting periods.

#### Royalty revenue

We record royalty revenue related to STENDRA/SPEDRA based on reports provided by our partners. We expect royalty revenue in 2018 to remain relatively constant from 2017 levels.

#### Cost of goods sold

	Three Months Ended March 31,		% Change
	2018	2017	Increase/ (Decrease) 2018 vs 2017
(In thousands, except percentages)			
Qsymia cost of goods sold	\$ 1,135	\$ 2,665	(57)%
STENDRA/SPEDRA cost of goods sold	1,586	3,502	(55)%
Total cost of goods sold	<u>\$ 2,721</u>	<u>\$ 6,167</u>	(56)%

Cost of goods sold for Qsymia dispensed to patients includes the inventory costs of API, third party contract manufacturing and packaging and distribution costs, royalties, cargo insurance, freight, shipping, handling and storage costs, and overhead costs of the employees involved with production. Cost of goods sold for STENDRA/SPEDRA shipped to our commercialization partners includes the inventory costs of API and tableting.

Cost of goods sold decreased overall in 2018 as compared to 2017 due primarily to decreased Qsymia product revenue and STENDRA/SPEDRA supply revenue. The change in cost of goods sold as a percentage of net product and supply revenue was due primarily to the sales mix between Qsymia and STENDRA/SPEDRA during the periods.

*Selling, general and administrative expense*

	Three Months Ended March 31,		% Change
	2018	2017	Increase/ (Decrease)
	(In thousands, except percentages)		
Selling and marketing	\$ 4,279	\$ 5,459	(22)%
General and administrative	5,789	5,972	(3)%
Total selling, general and administrative expenses	\$ 10,068	\$ 11,431	(12)%

The decrease in selling and marketing expenses for the three months ended March 31, 2018, compared to the same period in 2017, was due primarily to lower employee costs as a result of the reduction of the size of our sales force in 2017, partially offset by increased spending for marketing programs. Selling and marketing expenses are expected to stay flat or decrease in the remainder of 2018 as compared to the first quarter of 2018.

The decrease in general and administrative expenses in the three months ended March 31, 2018 compared to the same period in 2017 was primarily due to lower spending for corporate activities. General and administrative expenses could fluctuate significantly due to the timing of activities within our business strategy review.

*Research and development expense*

	Three Months Ended March 31,		% Change
Drug Indication/Description	2018	2017	Increase/(Decrease)
	(In thousands, except percentages)		
Qsymia	\$ 19	\$ 108	(82)%
STENDRA	49	2	2,350 %
Tacrolimus - PAH	561	1,186	(53)%
Share-based compensation	81	85	(5)%
Overhead costs*	693	799	(13)%
Total research and development expenses	\$ 1,403	\$ 2,180	(36)%

\*Overhead costs include compensation and related expenses, consulting, legal and other professional services fees relating to research and development activities, which we do not allocate to specific projects.

The decrease in total research and development expenses in the three months ended March 31, 2018 as compared to the same period in 2017 was primarily due to lower spending for the development of tacrolimus for the treatment of PAH, as the spending in 2017 included the license fees paid to Selten. We expect that our research and development expenses will increase over the remaining nine months in 2018 as we continue to complete our post-marketing requirements for Qsymia, specifically an adolescent safety and efficacy trial, and increase development activities for tacrolimus for the treatment of PAH.

*Interest expense and other expense, net*

Interest expense and other expense, net was \$8.3 million for each of the three months ended March 31, 2018 and 2017. Interest expense and other expense, net consists primarily of interest expense and the amortization of issuance costs from our Convertible Notes and Senior Secured Notes and the amortization of the debt discount on the Convertible Notes. Other expense and income were not significant. We expect interest and other expense (income) for the remainder of 2018 to remain relatively consistent with first quarter levels.

*(Benefit from) provision for income taxes*

For the three months ended March 31, 2018, we recorded a provision for income taxes of \$12,000, compared to a benefit of \$12,000 for the three months ended March 31, 2017. The benefit and provision for income taxes for both of the periods is primarily comprised of state taxes during the period.

We periodically evaluate the realizability of our net deferred tax assets based on all available evidence, both positive and negative. The realization of net deferred tax assets is dependent on our ability to generate

sufficient future taxable income during periods prior to the expiration of tax attributes to fully utilize these assets. We weighed both positive and negative evidence and determined that there is a continued need for a full valuation allowance on our deferred tax assets in the U.S. as of March 31, 2018.

## LIQUIDITY AND CAPITAL RESOURCES

*Cash.* Cash, cash equivalents and available-for-sale securities totaled \$209.1 million at March 31, 2018, as compared to \$226.3 million at December 31, 2017. The decrease was primarily due to net cash used for operating activities and debt service obligations during the period.

We invest our excess cash balances in money market, U.S. government securities and corporate debt securities in accordance with our investment policy. Our investment policy has the primary investment objectives of preservation of principal; however, there may be times when certain of the securities in our portfolio will fall below the credit ratings required in the policy. If those securities are downgraded or impaired, we would experience realized or unrealized losses in the value of our portfolio, which would have an adverse effect on our results of operations, liquidity and financial condition. From time to time, the Company may also invest its cash to retire or purchase its outstanding debt in open market purchases, privately negotiated transactions or otherwise. Investment securities are exposed to various risks, such as interest rate, market and credit. Due to the level of risk associated with certain investment securities and the level of uncertainty related to changes in the value of investment securities, it is possible that changes in these risk factors in the near term could have an adverse material impact on our results of operations or stockholders' equity.

*Accounts Receivable.* We extend credit to our customers for product sales resulting in accounts receivable. Customer accounts are monitored for past due amounts. Past due accounts receivable, determined to be uncollectible, are written off against the allowance for doubtful accounts. Allowances for doubtful accounts are estimated based upon past due amounts, historical losses and existing economic factors, and are adjusted periodically. Historically, we have had no significant uncollectable accounts receivable. We offer cash discounts to our customers, generally 2% of the sales price as an incentive for prompt payment.

Accounts receivable (net of allowance for cash discounts) at March 31, 2018, was \$11.3 million, as compared to \$12.2 million at December 31, 2017. Currently, we do not have any significant concerns related to accounts receivable or collections.

### Summary Cash Flows

	Three Months Ended March 31,	
	2018	2017
	(in thousands)	
Cash provided by (used for):		
Operating activities	\$ (11,988)	\$ (7,072)
Investing activities	26,991	(7,882)
Financing activities	(4,590)	(2,076)

*Operating Activities.* For the three months ended March 31, 2018, cash used for operating activities resulted from our net loss as adjusted for non-cash items, including the decrease in deferred revenue, in addition to an increase in inventories and a decrease in accounts payable. For the three months ended March 31, 2017, cash used for operating activities resulted from our net loss as adjusted for non-cash items. Additional decreases were due to increases in accounts receivable, partially offset by decreases in prepaid expenses and increases in accrued liabilities.

*Investing Activities.* Cash used or provided by investing activities primarily relates to the purchases and maturities of investment securities. The fluctuations from period to period are due primarily to the timing of purchases, sales and maturities of these investment securities.

*Financing Activities.* Cash used for financing activities for the three months ended March 31, 2018 and 2017 primarily related to our repayments of \$4.6 million and \$2.1 million, respectively, under the Senior Secured Notes.

We anticipate that our existing capital resources combined with anticipated future cash flows will be sufficient to support our operating needs at least for the next twelve months. However, we anticipate that we may require additional funding to evaluate commercial opportunities, which could come in the form of an asset

acquisition, such as our acquisition of PANCREAZE, a license, a co-development agreement, a merger or acquisition or other form, create a pathway for centralized approval of the marketing authorization application for Qsiva in the EU, conduct post-approval clinical studies for Qsymia, conduct non-clinical and clinical research and development work to support regulatory submissions and applications for our current and future investigational drug candidates, finance the costs involved in filing and prosecuting patent applications and enforcing or defending our patent claims, if any, to fund operating expenses and manufacture quantities of our investigational drug candidates and to make payments under our existing license agreements and supply agreements.

If we require additional capital, we may seek any required additional funding through collaborations, public and private equity or debt financings, capital lease transactions or other available financing sources. Additional financing may not be available on acceptable terms, or at all. If additional funds are raised by issuing equity securities, substantial dilution to existing stockholders may result. If adequate funds are not available, we may be required to delay, reduce the scope of or eliminate one or more of our commercialization or development programs or obtain funds through collaborations with others that are on unfavorable terms or that may require us to relinquish rights to certain of our technologies, product candidates or products that we would otherwise seek to develop on our own.

#### ***Off-Balance Sheet Arrangements***

We have not entered into any off-balance sheet financing arrangements and have not established any special purpose entities. We have not guaranteed any debt or commitments of other entities or entered into any options on non-financial assets.

#### ***Commitments and Contingencies***

We indemnify our officers and directors for certain events or occurrences pursuant to indemnification agreements, subject to certain limits. We may be subject to contingencies that may arise from matters such as product liability claims, legal proceedings, stockholder suits and tax matters and as such, we are unable to estimate the potential exposure related to these indemnification agreements. We have not recognized any liabilities relating to these agreements as of March 31, 2018.

#### ***Contractual Obligations***

During the three months ended March 31, 2018, there were no material changes to our contractual obligations described under Management's Discussion and Analysis of Financial Condition and Results of Operations contained in Part II, Item 7 of our Annual Report on Form 10-K for our fiscal year ended December 31, 2017, filed with the SEC on March 14, 2018, and as amended by the Form 10-K/A filed on April 26, 2018 with the SEC, other than the fulfillment of existing obligations in the ordinary course of business.

### **ITEM 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK**

#### **Market and Interest Rate Risk**

In the normal course of business, our financial position is subject to a variety of risks, including market risk associated with interest rate movements and foreign currency exchange risk. Our cash, cash equivalents and available-for-sale securities as of March 31, 2018, consisted primarily of money market funds, U.S. Treasury securities and corporate debt securities. Our cash is invested in accordance with an investment policy approved by our Board of Directors that specifies the categories (money market funds, U.S. Treasury securities and debt securities of U.S. government agencies, corporate bonds, asset-backed securities, and other securities), allocations, and ratings of securities we may consider for investment. Currently, we have focused on investing in U.S. Treasuries until market conditions improve.

Our market risk associated with interest rate movements is affected by changes in the general level of U.S. interest rates, particularly because the majority of our investments are in short-term marketable debt securities. The primary objective of our investment activities is to preserve principal. Some of the securities that we invest in may be subject to market risk. This means that a change in prevailing interest rates may cause the value of the investment to fluctuate. For example, if we purchase a security that was issued with a fixed interest rate and the prevailing interest rate later rises, the value of our investment may decline. A hypothetical 100 basis point increase in interest rates would reduce the fair value of our available-for-sale securities at March 31, 2018, by approximately \$1.0

million. In general, money market funds are not subject to market risk because the interest paid on such funds fluctuates with the prevailing interest rate.

A portion of our operations consist of revenues from outside of the United States, some of which are denominated in Euros, and, as such, we have foreign currency exchange exposure for these revenues and associated accounts receivable. Future fluctuations in the Euro exchange rate may impact our revenues and cash flows.

#### **ITEM 4. CONTROLS AND PROCEDURES**

(a.) Evaluation of disclosure controls and procedures. We maintain disclosure controls and procedures that are designed to ensure that information required to be disclosed in our reports under the Securities Exchange Act of 1934, as amended, or the Exchange Act, is recorded, processed, summarized and reported within the timelines specified in the rules and forms of the SEC and that such information is accumulated and communicated to our management, including our principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure. In designing and evaluating the disclosure controls and procedures, management recognized that any controls and procedures, no matter how well designed and operated, can only provide reasonable assurance of achieving the desired control objectives, and in reaching a reasonable level of assurance, management necessarily was required to apply its judgment in evaluating the cost-benefit relationship of possible controls and procedures.

As required by SEC Rule 13a-15(b), our management carried out an evaluation, under the supervision and with the participation of our principal executive officer and our principal financial officer, of the effectiveness of the design and operation of VIVUS's disclosure controls and procedures as of the end of the period covered by this Quarterly Report on Form 10-Q. Based on the evaluation, our principal executive officer and principal financial officer concluded that our disclosure controls and procedures were effective.

(b.) Changes in internal controls. There was no change in our internal control over financial reporting identified in connection with the evaluation required by Rules 13a-15(d) and 15d-15(d) of the Exchange Act that occurred during the period covered by this Quarterly Report on Form 10-Q that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

## PART II: OTHER INFORMATION

### ITEM 1. LEGAL PROCEEDINGS

#### *Shareholder Lawsuit*

On March 27, 2014, Mary Jane and Thomas Jasin, who purport to be purchasers of VIVUS common stock, filed an Amended Complaint in Santa Clara County Superior Court alleging securities fraud against the Company and three of its former officers and directors. In that complaint, captioned *Jasin v. VIVUS, Inc.*, Case No. 114 cv 261427, plaintiffs asserted claims under California's securities and consumer protection securities statutes. Plaintiffs alleged generally that defendants misrepresented the prospects for the Company's success, including with respect to the launch of Qsymia, while purportedly selling VIVUS stock for personal profit. Plaintiffs alleged losses of "at least" \$2.8 million, and sought damages and other relief. On July 18, 2014, the same plaintiffs filed a complaint in the United States District Court for the Northern District of California, captioned *Jasin v. VIVUS, Inc.*, Case No. 5:14 cv 03263. The Jasins' federal complaint alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended, based on facts substantially similar to those alleged in their state court action. On September 15, 2014, pursuant to an agreement between the parties, plaintiffs voluntarily dismissed their state court action with prejudice. Defendants moved to dismiss the federal action and moved to dismiss again after plaintiffs amended their complaint to include additional factual allegations and to add seven new claims under California law. The court granted the latter motion on June 18, 2015, dismissing the seven California claims with prejudice and dismissing the two federal claims with leave to amend. Plaintiffs filed a Second Amended Complaint on August 17, 2015. Defendants moved to dismiss that complaint as well. On April 19, 2016, the court granted defendants' motion to dismiss with prejudice and entered judgment in favor of defendants. Plaintiffs filed a notice of appeal to the Ninth Circuit Court of Appeals on May 18, 2016. The Ninth Circuit issued a decision on January 16, 2018, affirming the district court's dismissal of the action. The deadlines for Plaintiffs to seek rehearing in the Ninth Circuit and to file a petition for certiorari in the Supreme Court have now expired and the matter is concluded.

#### *Qsymia ANDA Litigation*

On May 7, 2014, the Company received a Paragraph IV certification notice from Actavis Laboratories FL indicating that it filed an abbreviated new drug application, or ANDA, with the U.S. Food and Drug Administration, or FDA, requesting approval to market a generic version of Qsymia. The initial notice alleged that six patents listed for Qsymia in the FDA Orange Book at the time the notice was received are invalid, unenforceable and/or will not be infringed by the manufacture, use, sale or offer for sale of a generic form of Qsymia as described in their ANDA. On June 12, 2014, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Actavis Laboratories FL, Inc., Actavis, Inc., and Actavis PLC, collectively referred to as Actavis. Additional patents covering Qsymia have been issued since May 2014 and after receiving Paragraph IV certification notices from Actavis with respect to those patents, the Company filed additional lawsuits against Actavis to include these additional patents in the litigation. On August 17, 2015, the lawsuits against Actavis were consolidated into a single suit (Case No. 14-3786 (SRC)(CLW)).

On June 29, 2017, the Company entered into a settlement agreement with Actavis resolving the suit against Actavis. On July 5, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

On March 5, 2015, the Company received a Paragraph IV certification notice from Teva Pharmaceuticals USA, Inc. indicating that it filed an ANDA with FDA, requesting approval to market a generic version of Qsymia and contending that patents listed for Qsymia in the Orange Book at the time of the notice are invalid, unenforceable and/or will not be infringed by the manufacture, use or sale of a generic form of Qsymia as described in their ANDA. On April 15, 2015, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Teva Pharmaceutical USA, Inc. and Teva Pharmaceutical Industries, Ltd., collectively referred to as Teva. A second Paragraph IV certification notice was received from Teva with respect to patents covering Qsymia that issued after March 2015, and the Company filed an additional lawsuit against Teva to include these additional patents in the litigation. The lawsuits against Teva were consolidated into a single suit (Case No. 15-2693 (SRC)(CLW)). On September 27, 2016, Dr. Reddy's Laboratories, S.A. and Dr. Reddy's Laboratories, Inc., collectively referred to as DRL, were substituted for Teva as defendants in the lawsuit.

On August 28, 2017, the Company entered into a settlement agreement with DRL resolving the suit against DRL. On September 6, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

The settlements resolve all patent litigation brought by VIVUS against generic pharmaceutical companies that have filed ANDAs seeking approval to market generic versions of Qsymia. The settlement agreement with Actavis will permit Actavis to begin selling a generic version of Qsymia on December 1, 2024, or earlier under certain circumstances. The settlement with DRL will permit DRL to begin selling a generic version of Qsymia on June 1, 2025, or earlier under certain circumstances.

#### *STENDRA ANDA Litigation*

On June 20, 2016, the Company received a Paragraph IV certification notice from Hetero USA, Inc. and Hetero Labs Limited, collectively referred to as Hetero, indicating that it filed an ANDA with FDA, requesting approval to market a generic version of STENDRA and contending that patents listed for STENDRA in the Orange Book at the time of the notice are invalid, unenforceable and/or will not be infringed by the manufacture, use or sale of a generic form of STENDRA as described in their ANDA. On July 27, 2016, the Company filed a lawsuit in the U.S. District Court for the District of New Jersey against Hetero (Case No. 16-4560 (KSH)(CLW)). On January 3, 2017, we entered into a settlement agreement with Hetero. Under the settlement agreement, Hetero was granted a license to manufacture and commercialize the generic version of STENDRA described in its ANDA filing in the United States as of the date that is the later of (a) October 29, 2024, which is 180 days prior to the expiration of the last to expire of the patents-in-suit, or (b) the date that Hetero obtains final approval from FDA of the Hetero ANDA. The settlement agreement provides for a full settlement of all claims that were asserted in the suit.

The Company is not aware of any other asserted or unasserted claims against it where it believes that an unfavorable resolution would have an adverse material impact on the operations or financial position of the Company.

## **ITEM 1A. RISK FACTORS**

Set forth below and elsewhere in this Quarterly Report on Form 10-Q and in other documents we file with the SEC, are risks and uncertainties that could cause actual results to differ materially from the results contemplated by the forward-looking statements contained in this Quarterly Report on Form 10-Q. These are not the only risks and uncertainties facing VIVUS. Additional risks and uncertainties not presently known to us or that we currently deem immaterial may also impair our business operations.

### **Risks Relating to our Business**

***We may not be able to successfully close the transaction to acquire the product rights to PANCREAZE for the U.S. and Canada in a timely fashion or at all.***

In May 2018, we announced that we had entered into an agreement to acquire all product rights for PANCREAZE® (pancrelipase) for the U.S. and Canada from Janssen Pharmaceuticals, Inc. for an aggregate payment of \$135 million. We expect to close this transaction before the end of the second quarter of 2018, pending successful completion of the U.S. merger review process. The process begins by filing Hart-Scott-Rodino notification forms with the Department of Justice, or DOJ, and Federal Trade Commission, or FTC, and paying the required filing fee. This begins a 30-day period in which the DOJ and FTC work together to determine whether they will further investigate the proposed transaction. If the DOJ and FTC do not decide to further investigate the transaction, then the transaction can close at the end of the 30-day period. We cannot guarantee that the DOJ and the FTC will allow the transaction to go forward or whether they will conduct an investigation. Such investigations can be costly and time-consuming. If we are not able to successfully close the transaction in a timely fashion or at all, it could have a materially adverse impact on our financial position.

***We may not be able to successfully close the note purchase transaction with Athyrium Capital Management in a timely fashion or at all.***

In April 2018, we entered into a note purchase agreement with Athyrium Capital Management for the issuance and sale of up to \$110 million of 10.375% senior secured notes due 2024 to be issued substantially concurrently with the consummation of the PANCREAZE acquisition described above, up to \$10 million of 10.375% senior secured notes due 2024 to be issued subsequently at our option within 12 months of the initial note issue date, and warrants for up to 3.3 million shares of our common stock to be issued concurrently with the issuance of the initial notes. The note purchase transaction is subject to customary representations, warranties, covenants, conditions and indemnities, including the closing of the PANCREAZE transaction. As previously disclosed, we intend to use a portion of the net proceeds to finance a portion of the PANCREAZE transaction and to repurchase \$60 million of our outstanding Convertible Notes. If we are not able to successfully close the transaction in a timely fashion or at all, it would have a materially adverse impact on our financial position.

***Our success will depend on our ability and that of our current or future collaborators to effectively and profitably commercialize Qsymia® and STENDRA/SPEDRA.***

Our success will depend on our ability and that of our current or future collaborators to effectively and profitably commercialize Qsymia and STENDRA/SPEDRA, which will include our ability to:

- expand the use of Qsymia through targeted patient and physician education;
- obtain marketing authorization by the EC for Qsiva™ in the EU;
- manage our alliances with MTPC, Menarini and Metuchen to help ensure the commercial success of avanafil;
- manage costs;
- improve third-party payor coverage, lower out-of-pocket costs to patients with discount programs, and obtain coverage for obesity under Medicare Part D;
- create market demand for Qsymia through patient and physician education, marketing and sales activities;
- achieve market acceptance and generate product sales;
- comply with the post-marketing requirements established by FDA, including Qsymia's Risk Evaluation and Mitigation Strategy, or REMS, any future changes to the REMS, and any other requirements established by FDA in the future;
- efficiently conduct the post-marketing studies required by FDA;
- comply with other healthcare regulatory requirements;
- comply with state and federal controlled substances requirements;
- maintain and defend our patents, if challenged;
- ensure that the active pharmaceutical ingredients, or APIs, for Qsymia and STENDRA/SPEDRA and the finished products are manufactured in sufficient quantities and in compliance with requirements of FDA and DEA and similar foreign regulatory agencies and with an acceptable quality and pricing level in order to meet commercial demand;
- ensure that the entire supply chain for Qsymia and STENDRA/SPEDRA, from APIs to finished products, efficiently and consistently delivers Qsymia and STENDRA/SPEDRA to customers; and
- effectively and efficiently manage our sales force and commercial team for the promotion of Qsymia.

If we are unable to successfully commercialize Qsymia and STENDRA/SPEDRA, our ability to generate product sales will be severely limited, which will have a material adverse impact on our business, financial condition, and results of operations.

***We have a new management team which may cause disruption in our business, and which could have a materially adverse effect on our results of operations.***

In connection with the Willow acquisition, former executives of Willow Biopharma Inc. have joined our management team, including John Amos who has joined us as our new Chief Executive Officer, M. Scott Oehrlein as our new Chief Operations Officer and Kenneth Suh as the President and CEO of Willow Biopharma Inc., now our wholly-owned subsidiary. If we are unable to successfully retain and integrate the new management team, our business could be harmed.

***We may not be able to successfully develop, launch and commercialize tacrolimus or any other potential future development programs.***

We may not be able to effectively develop and profitably launch and commercialize tacrolimus or any other potential future development programs which we may undertake, which will include our ability to:

- successfully develop or acquire a proprietary formulation of tacrolimus as a precursor to the clinical development process;
- effectively conduct phase 2 and phase 3 clinical testing on tacrolimus, which could be delayed by slow patient enrollment, long treatment time required to demonstrate effectiveness, disruption of operations at clinical trial sites, adverse medical events or side effects in treated patients, failure of patients taking the placebo to continue to participate in the clinical trials, and insufficient clinical trial data to support effectiveness of tacrolimus;
- obtain regulatory approval and market authorization for tacrolimus in the U.S., EU and other territories;
- develop, validate and maintain a commercially viable manufacturing process that is compliant with cGMP;
- establish and effectively manage a supply chain for tacrolimus and future development programs to ensure that the API and the finished products are manufactured in sufficient quantities and in compliance with regulatory requirements and with acceptable quality and pricing in order to meet commercial demand;
- effectively determine and manage the appropriate commercialization strategy;
- manage costs;
- achieve market acceptance by patients, the medical community and third-party payors and generate product sales;
- effectively compete with other therapies;
- maintain a continued acceptable safety profile for tacrolimus following approval;
- comply with healthcare regulatory requirements; and
- maintain and defend our patents, if challenged.

If we are unable to successfully develop, launch and commercialize tacrolimus, our ability to generate product sales will be severely limited, which will have a material adverse impact on our business, financial condition, and results of operations.

***Changes to our strategic business plan may cause uncertainty regarding the future of our business, and may adversely impact employee hiring and retention, our stock price, and our revenue, operating results, and financial condition.***

In 2016, we initiated a business strategy review with an outside advisor. These changes, and the potential for additional changes to our management, organizational structure and strategic business plan, may cause

speculation and uncertainty regarding our future business strategy and direction. These changes may cause or result in:

- disruption of our business or distraction of our employees and management;
- difficulty in recruiting, hiring, motivating and retaining talented and skilled personnel;
- stock price volatility; and
- difficulty in negotiating, maintaining or consummating business or strategic relationships or transactions.

If we are unable to mitigate these or other potential risks, our revenue, operating results and financial condition may be adversely impacted.

***We depend on our collaboration partners to gain or maintain approval, market, and sell Qsymia and STENDRA/SPEDRA in their respective licensed territories.***

We rely on our collaboration partners, including Alvogen, MTPC, Menarini and Metuchen, to successfully commercialize Qsymia and STENDRA/SPEDRA in their respective territories, including obtaining any necessary approvals and we cannot assure you that they will be successful. Our dependence on our collaborative arrangements for the commercialization of Qsymia and STENDRA/SPEDRA, including our license agreements with Alvogen, MTPC, Menarini and Metuchen, subject us to a number of risks, including the following:

- we may not be able to control the commercialization of our drug products in the relevant territories, including the amount, timing and quality of resources that our collaborators may devote to our drug products;
- our collaborators may experience financial, regulatory or operational difficulties, which may impair their ability to commercialize our drug products;
- our collaborators may be required under the laws of the relevant territories to disclose our confidential information or may fail to protect our confidential information;
- as a requirement of the collaborative arrangement, we may be required to relinquish important rights with respect to our drug products, such as marketing and distribution rights;
- business combinations or significant changes in a collaborator's business strategy may adversely affect a collaborator's willingness or ability to satisfactorily complete its commercialization or other obligations under any collaborative arrangement;
- legal disputes or disagreements may occur with one or more of our collaborators;
- a collaborator could independently move forward with a competing investigational drug candidate developed either independently or in collaboration with others, including with one of our competitors; and
- a collaborator could terminate the collaborative arrangement, which could negatively impact the continued commercialization of our drug products. For example, in September 2016, Auxilium terminated its agreement with us to commercialize STENDRA in the U.S. and Canada and, in March 2017, Sanofi terminated its agreement with us to commercialize STENDRA/SPEDRA in Africa, the Middle East, Turkey, and the CIS, including Russia.

In addition, under our license agreement with MTPC, we are obligated to ensure that Menarini, Metuchen, and any future sublicensees comply with the terms and conditions of our license agreement with MTPC, and MTPC has the right to terminate our license rights to avanafil upon any uncured material breach. Consequently, failure by Menarini, Metuchen, or any future sublicensees to comply with these terms and conditions could result in the termination of our license rights to avanafil on a worldwide basis, which would delay, impair, or preclude our ability to commercialize avanafil.

If any of our collaboration partners fail to successfully commercialize Qsymia or STENDRA/SPEDRA, our business may be negatively affected and we may receive limited or no revenues under our agreements with them.

***There have been substantial changes to the Internal Revenue Code, some of which could have an adverse effect on our business.***

The Tax Cuts and Jobs Act made substantial changes to the Internal Revenue Code, effective January 1, 2018, some of which could have an adverse effect on our business. In addition to reducing the top corporate income tax rate, changes that could impact our business in the future include (i) eliminating the ability to utilize net operating losses, or NOLs, to reduce income in prior tax years and limiting the utilization of NOLs generated after December 31, 2017 to 80% of future taxable income, which could affect the timing of our ability to utilize NOLs, and (ii) limiting the amount of business interest expenses that can be deducted to 30% of earnings before interest, taxes, depreciation and amortization.

***We currently rely on reports from our commercialization partners in determining our royalty revenues, and these reports may be subject to adjustment or restatement, which may materially affect our financial results.***

We have royalty and milestone-bearing license and commercialization agreements for STENDRA/SPEDRA with Menarini and, prior to October 1, 2016, with Auxilium. In determining our royalty revenue from such agreements, we rely on our collaboration partners to provide accounting estimates and reports for various discounts and allowances, including product returns. As a result of fluctuations in inventory, allowances and buying patterns, actual sales and product returns of STENDRA/SPEDRA in particular reporting periods may be affected, resulting in the need for our commercialization partners to adjust or restate their accounting estimates set forth in the reports provided to us. For example, in April 2015, we were informed by Endo, upon their purchase of Auxilium, that Endo had revised its accounting estimate for STENDRA return reserve related to sales made in 2014. Under the terms of our license and commercialization agreement, adjustments to the return reserve can be deducted from reported net revenue. As a result, in the year ended December 31, 2015, we recorded an adjustment of \$1.2 million to reduce our royalty revenue on net sales of STENDRA. The reduction in royalty revenue resulted in an increase to net loss of \$1.2 million, or \$0.01 per share, for the year ended December 31, 2015. Such adjustments or restatements may materially and negatively affect our financial position and results of operations. Beginning October 1, 2016, we ceased earning royalty revenue from U.S. sales as a result of the termination of our license and commercialization agreement with Auxilium. Our new license agreement with Metuchen is royalty-free as to us.

***If we are unable to enter into agreements with collaborators for the territories that are not covered by our existing commercialization agreements, our ability to commercialize STENDRA/SPEDRA in these territories may be impaired.***

We intend to enter into collaborative arrangements or a strategic alliance with one or more pharmaceutical partners or others to commercialize STENDRA/SPEDRA in territories that are not covered by our current commercial collaboration agreements, such as Africa, the Middle East, Turkey, the CIS, Mexico and Central America. We may be unable to enter into agreements with third parties for STENDRA/SPEDRA for these territories on favorable terms or at all, which could delay, impair, or preclude our ability to commercialize STENDRA/SPEDRA in these territories.

***Failure to obtain regulatory approval in foreign jurisdictions will prevent us from marketing our products abroad.***

In order to market products in many foreign jurisdictions, we, or our partners, must obtain separate regulatory approvals. Approval by FDA in the U.S. does not ensure approval by regulatory authorities in other countries, and approval by one foreign regulatory authority does not ensure approval by regulatory authorities in other foreign countries. For example, while our drug STENDRA/SPEDRA has been approved in both the U.S. and the EU, our drug Qsymia has been approved in the U.S. but Qsiva (the intended trade name for Qsymia in the EU) was denied a marketing authorization by the EC due to concerns over the potential cardiovascular and central nervous system effects associated with long-term use, teratogenic potential and use by patients for whom Qsiva would not have been indicated. We intend to seek approval, either directly or through our collaboration partners, for Qsymia and STENDRA in other territories outside the U.S. and the EU. However, we have had limited interactions with foreign regulatory authorities, and the approval procedures vary among countries and can involve additional testing. Foreign regulatory approvals may not be obtained, by us or our collaboration partners responsible for

obtaining approval, on a timely basis, or at all, for any of our products. The failure to receive regulatory approvals in a foreign country would prevent us from marketing and commercializing our products in that country, which could have a material adverse effect on our business, financial condition and results of operations.

***We, together with Alvogen, Menarini, Metuchen and any potential future collaborators in certain territories, intend to market Qsymia and STENDRA/SPEDRA outside the U.S., which will subject us to risks related to conducting business internationally.***

We, through Alvogen, Menarini, Metuchen and any potential future collaborators in certain territories, intend to manufacture, market, and distribute Qsymia and STENDRA/SPEDRA outside the U.S. We expect that we will be subject to additional risks related to conducting business internationally, including:

- different regulatory requirements for drug approvals in foreign countries;
- differing U.S. and foreign drug import and export rules;
- reduced protection for intellectual property rights in some foreign countries;
- unexpected changes in tariffs, trade barriers and regulatory requirements;
- different reimbursement systems;
- economic weakness, including inflation, or political instability in particular foreign economies and markets;
- compliance with tax, employment, immigration and labor laws for employees living or traveling abroad;
- foreign taxes, including withholding of payroll taxes;
- foreign currency fluctuations, which could result in increased operating expenses and reduced revenues, and other obligations incidental to doing business in another country;
- workforce uncertainty in countries where labor unrest is more common than in the U.S.;
- production shortages resulting from events affecting raw material supply or manufacturing capabilities abroad;
- potential liability resulting from development work conducted by these distributors; and
- business interruptions resulting from geopolitical actions, including war and terrorism, or natural disasters.

***We have significant inventories on hand and, for the year ended December 31, 2015, we recorded inventory impairment and commitment fees totaling \$29.5 million, primarily to write off excess inventory related to Qsymia.***

We maintain significant inventories and evaluate these inventories on a periodic basis for potential excess and obsolescence. During the year ended December 31, 2015, we recognized total charges of \$29.5 million, primarily for Qsymia inventories on hand in excess of projected demand. The inventory impairment charges were based on our analysis of the then-current Qsymia inventory on hand and remaining shelf life, in relation to our projected demand for the product. The current FDA-approved commercial product shelf life for Qsymia is 36 months. STENDRA is approved in the U.S. and SPEDRA is approved in the EU for 48 months of commercial product shelf life.

Our write-down for excess and obsolete inventory is subjective and requires forecasting of the future market demand for our products. Forecasting demand for Qsymia, a drug in the obesity market in which there had been no new FDA-approved medications in over a decade prior to 2012, and for which reimbursement from third-party payors had previously been non-existent, has been difficult. Forecasting demand for STENDRA/SPEDRA, a drug that is new to a crowded and competitive market and has limited sales history, is also difficult. We will continue to evaluate our inventories on a periodic basis. The value of our inventories could be impacted if actual sales differ significantly from our estimates of future demand or if any significant unanticipated changes in future

product demand or market conditions occur. Any of these events, or a combination thereof, could result in additional inventory write-downs in future periods, which could be material.

***Our failure to manage and maintain our distribution network for Qsymia or compliance with certain requirements, including requirements of the Qsymia REMS program, could compromise the commercialization of this product.***

We rely on Cardinal Health 105, Inc., or Cardinal Health, a third-party distribution and supply-chain management company, to warehouse Qsymia and distribute it to the certified home delivery pharmacies and wholesalers that then distribute Qsymia directly to patients and certified retail pharmacies. Cardinal Health provides billing, collection and returns services. Cardinal Health is our exclusive supplier of distribution logistics services, and accordingly we depend on Cardinal Health to satisfactorily perform its obligations under our agreement with them, including compliance with relevant state and federal laws.

Pursuant to the REMS program applicable to Qsymia, our distribution network is through a small number of certified home delivery pharmacies and wholesalers and through a broader network of certified retail pharmacies. We have contracted through a third-party vendor to certify the retail pharmacies and collect required data to support the Qsymia REMS program. In addition to providing services to support the distribution and use of Qsymia, each of the certified pharmacies has agreed to comply with the REMS program requirements and, through our third-party data collection vendor, will provide us with the necessary patient and prescribing healthcare provider, or HCP, data. In addition, we have contracted with third-party data warehouses to store this patient and HCP data and report it to us. We rely on this third-party data in order to recognize revenue and comply with the REMS requirements for Qsymia, such as data analysis. This distribution and data collection network requires significant coordination with our sales and marketing, finance, regulatory and medical affairs teams, in light of the REMS requirements applicable to Qsymia.

We rely on the certified pharmacies to implement a number of safety procedures and report certain information to our third-party REMS data collection vendor. Failure to maintain our contracts with Cardinal Health, our third-party REMS data collection vendor, or with the third-party data warehouses, or the inability or failure of any of them to adequately perform under our contracts with them, could negatively impact the distribution of Qsymia, or adversely affect our ability to comply with the REMS applicable to Qsymia. Failure to comply with a requirement of an approved REMS can result in, among other things, civil penalties, imposition of additional burdensome REMS requirements, suspension or revocation of regulatory approval and criminal prosecution. Failure to coordinate financial systems could also negatively impact our ability to accurately report and forecast product revenue. If we are unable to effectively manage the distribution and data collection process, sales of Qsymia could be severely compromised and our business, financial condition and results of operations would be harmed.

***If we are unable to enter into agreements with suppliers or our suppliers fail to supply us with the APIs for our products or finished products or if we rely on single-source suppliers, we may experience delays in commercializing our products.***

We currently do not have supply agreements for topiramate or phentermine, which are the APIs used in Qsymia. We cannot guarantee that we will be successful in entering into supply agreements on reasonable terms or at all or that we or our suppliers will be able to obtain or maintain the necessary regulatory approvals or state and federal controlled substances registrations for current or potential future suppliers in a timely manner or at all.

We anticipate that we will continue to rely on single-source suppliers for phentermine and topiramate for the foreseeable future. Any production shortfall on the part of our suppliers that impairs the supply of phentermine or topiramate could have a material adverse effect on our business, financial condition and results of operations. If we are unable to obtain a sufficient quantity of these compounds, there could be a substantial delay in successfully developing a second source supplier. An inability to continue to source product from any of these suppliers, which could be due to regulatory actions or requirements affecting the supplier, adverse financial or other strategic developments experienced by a supplier, labor disputes or shortages, unexpected demands or quality issues, could adversely affect our ability to satisfy demand for Qsymia, which could adversely affect our product sales and operating results materially, which could significantly harm our business.

We currently do not have any manufacturing facilities and intend to continue to rely on third parties for the supply of the API and tablets, as well as for the supply of starting materials. However, we cannot be certain that we or our suppliers will be able to obtain or maintain the necessary regulatory approvals or registrations for these suppliers in a timely manner or at all.

Sanofi Chimie manufactures and supplies the API for avanafil on an exclusive basis in the United States and other territories and on a semi-exclusive basis in Europe, including the EU, Latin America and other territories. Sanofi Winthrop Industrie manufactures and supplies the avanafil tablets on an exclusive basis in the United States and other territories and on a semi-exclusive basis in Europe, including the EU, Latin America and other territories. We have entered into supply agreements with Menarini and Metuchen under which we are obligated to supply them with avanafil tablets. If we are unable to maintain a reliable supply of avanafil API or tablets from Sanofi Chimie and/or Sanofi Winthrop Industrie, we may be unable to satisfy our obligations under these supply agreements in a timely manner or at all, and we may, as a result, be in breach of one or both of these agreements.

***We have in-licensed all or a portion of the rights to Qsymia and STENDRA from third parties. If we default on any of our material obligations under those licenses, we could lose rights to these drugs.***

We have in-licensed and otherwise contracted for rights to Qsymia and STENDRA, and we may enter into similar licenses in the future. Under the relevant agreements, we are subject to commercialization, development, supply, sublicensing, royalty, insurance and other obligations. If we fail to comply with any of these requirements, or otherwise breach these license agreements, the licensor may have the right to terminate the license in whole or to terminate the exclusive nature of the license. Loss of any of these licenses or the exclusive rights provided therein could harm our financial condition and operating results.

In particular, we license the rights to avanafil from MTPC, and we have certain obligations to MTPC in connection with that license. We license the rights to Qsymia from Dr. Najarian. We believe we are in compliance with the material terms of our license agreements with MTPC and Dr. Najarian. However, there can be no assurance that this compliance will continue or that the licensors will not have a differing interpretation of the material terms of the agreements. If the license agreements were terminated early or if the terms of the licenses were contested for any reason, it would have a material adverse impact on our ability to commercialize products subject to these agreements, our ability to raise funds to finance our operations, our stock price and our overall financial condition. The monetary and disruption costs of any disputes involving our agreements could be significant despite rulings in our favor.

***Our ability to gain market acceptance and generate revenues will be subject to a variety of risks, many of which are out of our control.***

Qsymia and STENDRA/SPEDRA may not gain market acceptance among physicians, patients, healthcare payors or the medical community. We believe that the degree of market acceptance and our ability to generate revenues from such drugs will depend on a number of factors, including:

- our ability to expand the use of Qsymia through targeted patient and physician education;
- our ability to find the right partner for expanded Qsymia commercial promotion to a broader primary care physician audience;
- our ability to obtain marketing authorization by the EC for Qsiva in the EU;
- contraindications for Qsymia and STENDRA/SPEDRA;
- competition and timing of market introduction of competitive drugs;
- quality, safety and efficacy in the approved setting;
- prevalence and severity of any side effects, including those of the components of our drugs;
- emergence of previously unknown side effects, including those of the generic components of our drugs;

- results of any post-approval studies;
- potential or perceived advantages or disadvantages over alternative treatments, including generics;
- the relative convenience and ease of administration and dosing schedule;
- the convenience and ease of purchasing the drug, as perceived by potential patients;
- strength of sales, marketing and distribution support;
- price, both in absolute terms and relative to alternative treatments;
- the effectiveness of our or our current or any future collaborators' sales and marketing strategies;
- the effect of current and future healthcare laws;
- availability of coverage and reimbursement from government and other third-party payors;
- the level of mandatory discounts required under federal and state healthcare programs and the volume of sales subject to those discounts;
- recommendations for prescribing physicians to complete certain educational programs for prescribing drugs;
- the willingness of patients to pay out-of-pocket in the absence of government or third-party coverage; and
- product labeling, product insert, or new REMS or post-market safety study or trial requirements of FDA or other regulatory authorities.

Our drugs may fail to achieve market acceptance or generate significant revenue to achieve sustainable profitability. In addition, our efforts to educate the medical community and third-party payors on the safety and benefits of our drugs may require significant resources and may not be successful.

***We are required to complete post-approval studies and trials mandated by FDA for Qsymia, and such studies and trials are expected to be costly and time consuming. If the results of these studies and trials reveal unacceptable safety risks, Qsymia may be required to be withdrawn from the market.***

Upon receiving approval to market Qsymia, FDA required that we perform additional studies of Qsymia including a cardiovascular outcome trial, or CVOT. We estimate the cost of a CVOT as currently designed to be between \$180 million and \$220 million incurred over a period of approximately five years. We have held several meetings with FDA to discuss alternative strategies for obtaining cardiovascular, or CV, outcomes data that would be substantially more feasible and that ensure timely collection of data to better inform on the CV safety of Qsymia. In September 2013, we submitted a request to the EMA for Scientific Advice, a procedure similar to the U.S. Special Protocol Assessment process, regarding use of a pre-specified interim analysis from the CVOT to assess the long-term treatment effect of Qsymia on the incidence of major adverse cardiovascular events in overweight and obese subjects with confirmed cardiovascular disease. Our request was to allow this interim analysis to support the resubmission of an application for a marketing authorization for Qsiva for treatment of obesity in accordance with the EU centralized marketing authorization procedure. We received feedback in 2014 from the EMA and the various competent authorities of the EU Member States. We worked with cardiovascular and epidemiology experts in exploring alternate solutions to demonstrate the long-term cardiovascular safety of Qsymia. After reviewing a summary of Phase 3 data relevant to CV risk and post-marketing safety data, the cardiology experts noted that they believe there was an absence of an overt CV risk signal and indicated that they did not believe a randomized placebo-controlled CVOT would provide additional information regarding the CV risk of Qsymia. The epidemiology experts maintained that a well-conducted retrospective observational study could provide data to further inform on potential CV risk. We worked with the expert group to develop a protocol and conduct a retrospective observational study. We have submitted information from this study to FDA in support of a currently pending supplemental New Drug Application (sNDA) seeking changes to the Qsymia label. Although we and consulted experts believe there is no overt signal for CV risk to justify the CVOT, we are committed to working with FDA to reach a resolution. There is no assurance, however, that FDA will accept any measures short of those specified in the CVOT to satisfy this requirement.

As for the EU, even if FDA were to determine that a CVOT is no longer necessary, there would be no assurance that the EMA would reach the same conclusion. There can be no assurance that we will be successful in obtaining FDA or EMA agreement that we have demonstrated the long-term cardiovascular safety of Qsymia. Furthermore, there can be no assurance that FDA or EMA will not request or require us to provide additional information or undertake additional preclinical studies and clinical trials or retrospective observational studies.

In addition to these studies, FDA may also require us to perform other lengthy post-approval studies or trials, for which we would have to expend significant additional resources, which could have an adverse effect on our operating results, financial condition and stock price. Failure to comply with the applicable regulatory requirements, including the completion of post-marketing studies and trials, can result in, among other things, civil monetary penalties, suspensions of regulatory approvals, operating restrictions and criminal prosecution. The restriction, suspension or revocation of regulatory approvals or any other failure to comply with regulatory requirements could have a material adverse effect on our business, financial condition, results of operations and stock price. We have not complied with all the regulatory timelines for the required post-marketing trials and studies, and this may be considered a violation of the statute if FDA does not find good cause.

***We may not be able to remain listed on The Nasdaq Stock Market.***

On October 4, 2017, we received a letter from The Nasdaq Stock Market, or Nasdaq, indicating that, based upon the closing bid price of our common stock for the preceding 30 consecutive business days, we no longer meet the continued listing requirement of maintaining a minimum bid price of \$1 per share, as set forth in Nasdaq Listing Rule 5450(a)(1). On April 3, 2018, we received a letter from Nasdaq indicating that we did not regain compliance within the compliance period. We have timely requested a hearing before a Nasdaq Hearing Panel. If Nasdaq delists our common stock, the delisting could adversely affect the market liquidity of our common stock and the price of our common stock.

***We depend upon consultants and outside contractors extensively in important roles within our company.***

We outsource many key functions of our business and therefore rely on a substantial number of consultants, and we will need to be able to effectively manage these consultants to ensure that they successfully carry out their contractual obligations and meet expected deadlines. However, if we are unable to effectively manage our outsourced activities or if the quality or accuracy of the services provided by consultants is compromised for any reason, our clinical trials or other development activities may be extended, delayed or terminated, and we may not be able to complete our post-approval clinical trials for Qsymia and STENDRA, obtain regulatory approval for our future investigational drug candidates, successfully commercialize our approved drugs or otherwise advance our business. There can be no assurance that we will be able to manage our existing consultants or find other competent outside contractors and consultants on commercially reasonable terms, or at all.

***Qsymia is a combination of two active ingredient drug products approved individually by FDA that are commercially available and marketed by other companies, although the specific dose strengths differ. As a result, Qsymia may be subject to substitution by prescribing physicians, or by pharmacists, with individual drugs contained in the Qsymia formulation, which would adversely affect our business.***

Although Qsymia is a once-a-day, proprietary extended-release formulation, both of the approved APIs (phentermine and topiramate) that are combined to produce Qsymia are commercially available as drug products at prices that together are lower than the price at which we sell Qsymia. In addition, the distribution and sale of these drug products is not limited under a REMS program, as is the case with Qsymia. Further, the individual drugs contained in the Qsymia formulation are available in retail pharmacies. We cannot be sure that physicians will view Qsymia as sufficiently superior to a treatment regimen of Qsymia's individual APIs to justify the significantly higher cost for Qsymia, and they may prescribe the individual generic drugs already approved and marketed by other companies instead of our combination drug. Although our U.S. and European patents contain composition, product formulation and method-of-use claims that we believe protect Qsymia, these patents may be ineffective or impractical to prevent physicians from prescribing, or pharmacists from dispensing, the individual generic constituents marketed by other companies instead of our combination drug. Phentermine and topiramate are currently available in generic form, although the doses used in Qsymia are currently not available. In the third

quarter of 2013, Supernus Pharmaceuticals, Inc. launched Trokendi XR™ and in the second quarter of 2014, Upsher-Smith Laboratories, Inc. launched Qudexy™. Both products provide an extended-release formulation of the generic drug topiramate that is indicated for certain types of seizures and migraines. Topiramate is not approved for obesity treatment, and phentermine is only approved for short-term treatment of obesity. However, because the price of Qsymia is significantly higher than the prices of the individual components as marketed by other companies, physicians may have a greater incentive to write prescriptions for the individual components outside of their approved indication, instead of for our combination drug, and this may limit how we price or market Qsymia. Similar concerns could also limit the reimbursement amounts private health insurers or government agencies in the U.S. are prepared to pay for Qsymia, which could also limit market and patient acceptance of our drug and could negatively impact our revenues.

In many regions and countries where we may plan to market Qsymia, the pricing of reimbursed prescription drugs is controlled by the government or regulatory agencies. The government or regulatory agencies in these countries could determine that the pricing for Qsymia should be based on prices for its APIs when sold separately, rather than allowing us to market Qsymia at a premium as a new drug, which could limit our pricing of Qsymia and negatively impact our revenues.

Once an applicant receives authorization to market a medicinal product in an EU Member State, through any application route, the applicant is required to engage in pricing discussions and negotiations with a separate pricing authority in that country. The legislators, policymakers and healthcare insurance funds in the EU Member States continue to propose and implement cost-containing measures to keep healthcare costs down, due in part to the attention being paid to healthcare cost containment and other austerity measures in the EU. Certain of these changes could impose limitations on the prices pharmaceutical companies are able to charge for their products. The amounts of reimbursement available from governmental agencies or third-party payors for these products may increase the tax obligations on pharmaceutical companies such as ours, or may facilitate the introduction of generic competition with respect to our products. Furthermore, an increasing number of EU Member States and other foreign countries use prices for medicinal products established in other countries as “reference prices” to help determine the price of the product in their own territory. Consequently, a downward trend in the price of medicinal products in some countries could contribute to similar downward trends elsewhere. In addition, the ongoing budgetary difficulties faced by a number of EU Member States, including Greece and Spain, have led and may continue to lead to substantial delays in payment and payment partially with government bonds rather than cash for medicinal products, which could negatively impact our revenues and profitability. Moreover, in order to obtain reimbursement of our medicinal products in some countries, including some EU Member States, we may be required to conduct clinical trials that compare the cost-effectiveness of our products to other available therapies. There can be no assurance that our medicinal products will obtain favorable reimbursement status in any country.

***If we become subject to product liability claims, we may be required to pay damages that exceed our insurance coverage.***

Qsymia and STENDRA/SPEDRA, like all pharmaceutical products, are subject to heightened risk for product liability claims due to inherent potential side effects. For example, because topiramate, a component of Qsymia, may increase the risk of congenital malformation in infants exposed to topiramate during the first trimester of pregnancy and also may increase the risk of suicidal thoughts and behavior, such risks may be associated with Qsymia as well. Other potential risks involving Qsymia may include, but are not limited to, an increase in resting heart rate, acute angle closure glaucoma, cognitive and psychiatric adverse events, metabolic acidosis, an increase in serum creatinine, hypoglycemia in patients with type 2 diabetes, kidney stone formation, decreased sweating and hypokalemia, or lower-than-normal amount of potassium in the blood.

Although we have obtained product liability insurance coverage for Qsymia, we may be unable to maintain this product liability coverage for Qsymia or any other of our approved drugs in amounts or scope sufficient to provide us with adequate coverage against all potential risks. A product liability claim in excess of, or excluded from, our insurance coverage would have to be paid out of cash reserves and could have a material adverse effect upon our business, financial condition and results of operations. Product liability insurance is expensive even with large self-insured retentions or deductibles, difficult to maintain, and current or increased coverage may not be available on acceptable terms, if at all.

In addition, we develop, test, and manufacture through third parties, approved drugs and future investigational drug candidates that are used by humans. We face an inherent risk of product liability exposure related to the testing of our approved drugs and investigational drug candidates in clinical trials. An individual may bring a liability claim against us if one of our approved drugs or future investigational drug candidates causes, or merely appears to have caused, an injury.

If we cannot successfully defend ourselves against a product liability claim, whether involving Qsymia, STENDRA/SPEDRA or a future investigational drug candidate or product, we may incur substantial liabilities. Regardless of merit or eventual outcome, liability claims may result in:

- injury to our reputation;
- withdrawal of clinical trial patients;
- costs of defending the claim and/or related litigation;
- cost of any potential adverse verdict;
- substantial monetary awards to patients or other claimants; and
- the inability to commercialize our drugs.

Damages awarded in a product liability action could be substantial and could have a negative impact on our financial condition. Whether or not we were ultimately successful in product liability litigation, such litigation would consume substantial amounts of our financial and managerial resources, and might result in adverse publicity, all of which would impair our business. In addition, product liability claims could result in an FDA investigation of the safety or efficacy of our product, our third-party manufacturing processes and facilities, or our marketing programs. An FDA investigation could also potentially lead to a recall of our products or more serious enforcement actions, limitations on the indications for which they may be used, or suspension or withdrawal of approval.

***The markets in which we operate are highly competitive and we may be unable to compete successfully against new entrants or established companies.***

Competition in the pharmaceutical and medical products industries is intense and is characterized by costly and extensive research efforts and rapid technological progress. We are aware of several pharmaceutical companies also actively engaged in the development of therapies for the treatment of obesity and erectile dysfunction. Many of these companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than we do. Some of the drugs that may compete with Qsymia may not have a REMS requirement and the accompanying complexities such a requirement presents. Our competitors may develop technologies and products that are more effective than those we are currently marketing or researching and developing. Such developments could render Qsymia and STENDRA less competitive or possibly obsolete.

Qsymia for the treatment of chronic weight management competes with several approved anti-obesity drugs including, Belviq® (lorcaserin), Arena Pharmaceutical's approved anti-obesity compound marketed by Eisai Inc., Eisai Co., Ltd.'s U.S. subsidiary; Xenical® (orlistat), marketed by Roche; alli®, the over-the-counter version of orlistat, marketed by GlaxoSmithKline; Contrave® (naltrexone/bupropion), Orexigen Therapeutics, Inc.'s anti-obesity compound; and Saxenda® (liraglutide), an anti-obesity compound marketed by Novo Nordisk A/S. Agents that have been approved for type 2 diabetes that have demonstrated weight loss in clinical studies may also compete with Qsymia. These include Farxiga™ (dapagliflozin) from AstraZeneca and Bristol-Myers Squibb, an SGLT2 inhibitor; Jardiance® (empagliflozin) from Boehringer Ingelheim, an SGLT2 inhibitor; Victoza® (liraglutide) from Novo Nordisk A/S, a GLP-1 receptor agonist; Invokana® (canagliflozin) from Johnson & Johnson's Janssen Pharmaceuticals, an SGLT2 inhibitor and Glyxambi® (empagliflozin/linagliptin) from Boehringer Ingelheim and Eli Lilly, an SGLT2 inhibitor and DPP-4 inhibitor combination product. Also, EnteroMedics® Inc. markets the Maestro Rechargeable System for certain obese adults, the first weight loss treatment device that targets the nerve pathway between the brain and the stomach that controls feelings of hunger and fullness.

There are also several other investigational drug candidates in Phase 2 clinical trials for the treatment of obesity. There are also a number of generic pharmaceutical drugs that are prescribed for obesity, predominantly phentermine. Phentermine is sold at much lower prices than we charge for Qsymia. The availability of branded

prescription drugs, generic drugs and over-the-counter drugs could limit the demand for, and the price we are able to charge for, Qsymia.

We also may face competition from the off-label use of the generic components in our drugs. In particular, it is possible that patients will seek to acquire phentermine and topiramate, the generic components of Qsymia. Neither of these generic components has a REMS program and both are available at retail pharmacies. Although the dose strength of these generic components has not been approved by FDA for use in the treatment of obesity, the off-label use of the generic components in the U.S. or the importation of the generic components from foreign markets could adversely affect the commercial potential for our drugs and adversely affect our overall business, financial condition and results of operations.

There are also surgical approaches to treat severe obesity that are becoming increasingly accepted. Two of the most well established surgical procedures are gastric bypass surgery and adjustable gastric banding, or lap bands. In February 2011, FDA approved the use of a lap band in patients with a BMI of 30 (reduced from 35) with comorbidities. The lowering of the BMI requirement will make more obese patients eligible for these types of bariatric procedures. In addition, other potential approaches that utilize various implantable devices or surgical tools are in development. Some of these approaches are in late-stage development and may be approved for marketing.

Qsymia may also face challenges and competition from newly developed generic products. Under the U.S. Drug Price Competition and Patent Term Restoration Act of 1984, known as the Hatch-Waxman Act, newly approved drugs and indications may benefit from a statutory period of non-patent marketing exclusivity. The Hatch-Waxman Act stimulates competition by providing incentives to generic pharmaceutical manufacturers to introduce non-infringing forms of patented pharmaceutical products and to challenge patents on branded pharmaceutical products. We received two notifications under paragraph IV of the Hatch-Waxman Act challenging certain of our Qsymia patents, and we filed suit against both challengers. In June 2017, the Company entered into a settlement agreement with Actavis Laboratories FL, Inc., Actavis, Inc., and Actavis PLC, collectively referred to as Actavis, and in August 2017, the Company entered into a settlement agreement with Dr. Reddy's Laboratories, S.A. and Dr. Reddy's Laboratories, Inc., collectively referred to as DRL. The settlement agreement with Actavis will permit Actavis to begin selling a generic version of Qsymia on December 1, 2024, or earlier under certain circumstances. The settlement with DRL will permit DRL to begin selling a generic version of Qsymia on June 1, 2025, or earlier under certain circumstances. It is possible that one or more additional companies may file an Abbreviated New Drug Application, or ANDA, and could receive FDA approval to market a generic version of Qsymia before the entry dates specified in our settlement agreements with Actavis and DRL. If a generic version of Qsymia is launched, this will harm our business. Generic manufacturers pursuing ANDA approval are not required to conduct costly and time-consuming clinical trials to establish the safety and efficacy of their products; rather, they are permitted to rely on FDA's finding that the innovator's product is safe and effective. Additionally, generic drug companies generally do not expend significant sums on sales and marketing activities, instead relying on physicians or payors to substitute the generic form of a drug for the branded form. Thus, generic manufacturers can sell their products at prices much lower than those charged by the innovative pharmaceutical or biotechnology companies who have incurred substantial expenses associated with the research and development of the drug product and who must spend significant sums marketing a new drug.

The FDCA provides that an ANDA holder and an innovator drug with a REMS with Elements to Assure Safe use, like Qsymia, must use a single shared REMS system to assure safe use unless FDA waives this requirement and permits the ANDA holder to implement a separate but comparable REMS. We cannot predict the outcome or impact on our business of any future action that we may take with regard to sharing our REMS program or if FDA grants a waiver allowing the generic competitor to market a generic drug with a separate but comparable REMS.

STENDRA for the treatment of ED competes with PDE5 inhibitors in the form of oral medications including Viagra® (sildenafil citrate), marketed by Pfizer, Inc.; Cialis® (tadalafil), marketed by Eli Lilly and Company; Levitra® (vardenafil), co marketed by GlaxoSmithKline plc and Schering Plough Corporation in the U.S.; and STAXYN® (vardenafil in an oral disintegrating tablet, or ODT), co-promoted by GlaxoSmithKline plc and Merck & Co., Inc.

New developments, including the development of other drug technologies and methods of preventing the incidence of disease, occur in the pharmaceutical and medical technology industries at a rapid pace. These

developments may render our drugs and future investigational drug candidates obsolete or noncompetitive. Compared to us, many of our potential competitors have substantially greater:

- research and development resources, including personnel and technology;
- regulatory experience;
- investigational drug candidate development and clinical trial experience;
- experience and expertise in exploitation of intellectual property rights; and
- access to strategic partners and capital resources.

As a result of these factors, our competitors may obtain regulatory approval of their products more rapidly than we or may obtain patent protection or other intellectual property rights that limit our ability to develop or commercialize our future investigational drug candidates. Our competitors may also develop drugs or surgical approaches that are more effective, more useful and less costly than ours and may also be more successful in manufacturing and marketing their products. In addition, our competitors may be more effective in commercializing their products. We currently outsource our manufacturing and therefore rely on third parties for that competitive expertise. There can be no assurance that we will be able to develop or contract for these capabilities on acceptable economic terms, or at all.

***We may participate in new partnerships and other strategic transactions that could impact our liquidity, increase our expenses and present significant distractions to our management.***

From time to time, we consider strategic transactions, such as out-licensing or in-licensing of compounds or technologies, acquisitions of companies and asset purchases. Most recently, on September 30, 2016, we entered into a license and commercialization agreement and a commercial supply agreement with Metuchen. Under the terms of the agreements, Metuchen received an exclusive license to develop, commercialize and promote STENDRA in the United States, Canada, South America and India, or the Territory, effective October 1, 2016. Additionally, on January 6, 2017, we entered into a Patent Assignment Agreement with Selten, whereby we received exclusive, worldwide rights for the development and commercialization of tacrolimus for the treatment of PAH and related vascular diseases. Further potential transactions we may consider include a variety of different business arrangements, including strategic partnerships, joint ventures, spin-offs, restructurings, divestitures, business combinations and investments. In addition, another entity may pursue us as an acquisition target. Any such transactions may require us to incur non-recurring or other charges, may increase our near- and long-term expenditures and may pose significant integration challenges, require additional expertise or disrupt our management or business, any of which could harm our operations and financial results.

As part of an effort to enter into significant transactions, we conduct business, legal and financial due diligence with the goal of identifying and evaluating material risks involved in the transaction. Despite our efforts, we ultimately may be unsuccessful in ascertaining or evaluating all such risks and, as a result, might not realize the expected benefits of the transaction. If we fail to realize the expected benefits from any transaction we may consummate, whether as a result of unidentified risks, integration difficulties, regulatory setbacks or other events, our business, results of operations and financial condition could be adversely affected.

***Our failure to successfully identify, acquire, develop and market additional investigational drug candidates or approved drugs would impair our ability to grow.***

As part of our growth strategy, we may acquire, in-license, develop and/or market additional products and investigational drug candidates. Most recently, on January 6, 2017, we entered into a Patent Assignment Agreement with Selten, whereby we received exclusive, worldwide rights for the development and commercialization of tacrolimus for the treatment of PAH and related vascular diseases. Because our internal research capabilities are limited, we may be dependent upon pharmaceutical and biotechnology companies, academic scientists and other researchers to sell or license products or technology to us. The success of this strategy depends partly upon our ability to identify, select and acquire promising pharmaceutical investigational drug candidates and products.

The process of proposing, negotiating and implementing a license or acquisition of an investigational drug candidate or approved product is lengthy and complex. Other companies, including some with substantially greater financial, marketing and sales resources, may compete with us for the license or acquisition of investigational drug candidates and approved products. We have limited resources to identify and execute the acquisition or in-licensing of third-party products, businesses and technologies and integrate them into our current infrastructure. Moreover, we may devote resources to potential acquisitions or in-licensing opportunities that are never completed, or we may fail to realize the anticipated benefits of such efforts. We may not be able to acquire the rights to additional investigational drug candidates on terms that we find acceptable, or at all.

In addition, future acquisitions may entail numerous operational and financial risks, including:

- exposure to unknown liabilities;
- disruption of our business and diversion of our management's time and attention to develop acquired products or technologies;
- incurrence of substantial debt or dilutive issuances of securities to pay for acquisitions;
- higher than expected acquisition, integration and maintenance costs;
- increased amortization expenses;
- difficulty and cost in combining the operations and personnel of any acquired businesses with our operations and personnel;
- impairment of relationships with key suppliers or customers of any acquired businesses due to changes in management and ownership; and
- inability to retain key employees of any acquired businesses.

Further, any investigational drug candidate that we acquire may require additional development efforts prior to commercial sale, including extensive clinical testing and obtaining approval by FDA and applicable foreign regulatory authorities. All investigational drug candidates are prone to certain failures that are relatively common in the field of drug development, including the possibility that an investigational drug candidate will not be shown to be sufficiently safe and effective for approval by regulatory authorities. In addition, we cannot be certain that any drugs that we develop or approved products that we may acquire will be commercialized profitably or achieve market acceptance.

***If we fail to retain our key personnel and hire, train and retain qualified employees, we may not be able to compete effectively, which could result in reduced revenues or delays in the development of our investigational drug candidates or commercialization of our approved drugs.***

Our success is highly dependent upon the skills of a limited number of key management personnel. To reach our business objectives, we will need to retain and hire qualified personnel in the areas of manufacturing, commercial operations, research and development, regulatory and legal affairs, business development, clinical trial design, execution and analysis, and pre-clinical testing. There can be no assurance that we will be able to retain or hire such personnel, as we must compete with other companies, academic institutions, government entities and other agencies. The loss of any of our key personnel or the failure to attract or retain necessary new employees could have an adverse effect on our research programs, investigational drug candidate development, approved drug commercialization efforts and business operations.

***We rely on third parties and collaborative partners to manufacture sufficient quantities of compounds within product specifications as required by regulatory agencies for use in our pre-clinical and clinical trials and commercial operations and an interruption to this service may harm our business.***

We do not have the ability to manufacture the materials we use in our pre-clinical and clinical trials and commercial operations. Rather, we rely on various third parties to manufacture these materials and there may be long lead times to obtain materials. There can be no assurance that we will be able to identify, contract with, qualify and obtain prior regulatory approval for additional sources of clinical materials. If interruptions in this supply occur

for any reason, including a decision by the third parties to discontinue manufacturing, technical difficulties, labor disputes, natural or other disasters, or a failure of the third parties to follow regulations, we may not be able to obtain regulatory approvals for our investigational drug candidates and may not be able to successfully commercialize these investigational drug candidates or our approved drugs.

Our third-party manufacturers and collaborative partners may encounter delays and problems in manufacturing our approved drugs or investigational drug candidates for a variety of reasons, including accidents during operation, failure of equipment, delays in receiving materials, natural or other disasters, political or governmental changes, or other factors inherent in operating complex manufacturing facilities. Supply-chain management is difficult. Commercially available starting materials, reagents, excipients, and other materials may become scarce, more expensive to procure, or not meet quality standards, and we may not be able to obtain favorable terms in agreements with subcontractors. Our third-party manufacturers may not be able to operate manufacturing facilities in a cost-effective manner or in a time frame that is consistent with our expected future manufacturing needs. If our third-party manufacturers, cease or interrupt production or if our third-party manufacturers and other service providers fail to supply materials, products or services to us for any reason, such interruption could delay progress on our programs, or interrupt the commercial supply, with the potential for additional costs and lost revenues. If this were to occur, we may also need to seek alternative means to fulfill our manufacturing needs.

For example, Catalent Pharma Solutions, LLC, or Catalent, is our sole source of clinical and commercial supplies for Qsymia. While Catalent has significant experience in commercial scale manufacturing, there is no assurance that Catalent will be successful in continuing to supply Qsymia at current levels or increasing the scale of the Qsymia manufacturing process, should the market demand for Qsymia expand beyond the level supportable by the current validated manufacturing process. Such a failure by Catalent to meet current demand or to further scale up the commercial manufacturing process for Qsymia could have a material adverse impact on our ability to realize commercial success with Qsymia in the U.S. market, and have a material adverse impact on our plan, market price of our common stock and financial condition.

For avanafil, Sanofi Chimie manufactures and supplies the API for avanafil on an exclusive basis in the United States and other territories and on a semi-exclusive basis in Europe, including the EU, Latin America and other territories. Sanofi Winthrop Industrie manufactures and supplies the avanafil tablets for STENDRA and SPEDRA on an exclusive basis in the United States and other territories and on a semi-exclusive basis in Europe, including the EU, Latin America and other territories. Sanofi is responsible for all aspects of manufacture, including obtaining the starting materials for the production of API. If Sanofi is unable to manufacture the API or tablets in sufficient quantities to meet projected demand, future sales could be adversely affected, which in turn could have a detrimental impact on our financial results, our license, commercialization, and supply agreements with our collaboration partners, and our ability to enter into a collaboration agreement for the commercialization in other territories.

Any failure of current or future manufacturing sites, including those of Sanofi Chimie and Sanofi Winthrop Industrie, to receive or maintain approval from FDA or foreign authorities, obtain and maintain ongoing FDA or foreign regulatory compliance, or manufacture avanafil API or tablets in expected quantities could have a detrimental impact on our ability to commercialize STENDRA under our agreements with Menarini and Metuchen and our ability to enter into a collaboration agreement for the commercialization of STENDRA in our other territories not covered by our agreements with Menarini and Metuchen.

***We rely on third parties to maintain appropriate levels of confidentiality of the data compiled during clinical, pre-clinical and retrospective observational studies and trials.***

We seek to maintain the confidential nature of our confidential information through contractual provisions in our agreements with third parties, including our agreements with clinical research organizations, or CROs, that manage our clinical studies for our investigational drug candidates. These CROs may fail to comply with their obligations of confidentiality or may be required as a matter of law to disclose our confidential information. As the success of our clinical studies depends in large part on our confidential information remaining confidential prior to, during and after a clinical study, any disclosure or breach affecting that information could have a material adverse effect on the outcome of a clinical study, our business, financial condition and results of operations.

The collection and use of personal health data and other personal data in the EU is governed by the provisions of the Data Protection Directive as implemented into national laws by the EU Member States. This Directive imposes restrictions on the processing (e.g., collection, use, disclosure) of personal data, including a number of requirements relating to the consent of the individuals to whom the personal data relates, the information provided to the individuals prior to processing their personal data, notification of data processing obligations to the competent national data protection authorities and the security and confidentiality of the personal data. The Data Protection Directive also imposes strict restrictions on the transfer of personal data out of the EU to the United States. Failure to comply with the requirements of the Data Protection Directive and the related national data protection laws of the EU Member States may result in fines and other administrative penalties. The General Data Protection Regulation, or GDPR, an EU-wide regulation that will be fully enforceable by May 25, 2018, will introduce new data protection requirements in the EU and substantial fines for violations of the data protection rules. The GDPR will increase our responsibility and liability in relation to EU personal data that we process and we may be required to put in place additional mechanisms ensuring compliance with the new EU data protection rules. This may be onerous and increase our cost of doing business.

***If we fail to comply with applicable healthcare and privacy and data security laws and regulations, we could face substantial penalties, liability and adverse publicity and our business, operations and financial condition could be adversely affected.***

Our arrangements with third-party payors, patients and customers expose us to broadly applicable federal and state healthcare laws and regulations pertaining to fraud and abuse. In addition, our operations expose us to privacy and data security laws and regulations. The restrictions under applicable federal and state healthcare laws and regulations, and privacy and data security laws and regulations, that may affect our ability to operate include, but are not limited to:

- the federal Anti-Kickback Statute, which prohibits, among other things, knowingly or willingly offering, paying, soliciting or receiving remuneration, directly or indirectly, in cash or in kind, to induce or reward the purchasing, leasing, ordering or arranging for or recommending the purchase, lease or order of any healthcare items or service for which payment may be made, in whole or in part, by federal healthcare programs such as Medicare and Medicaid. This statute has been interpreted to apply to arrangements between pharmaceutical companies on one hand and prescribers, purchasers and formulary managers on the other. Liability under the Anti-Kickback Statute may be established without proving actual knowledge of the statute or specific intent to violate it. In addition, the government may assert that a claim including items or services resulting from a violation of the federal Anti-Kickback Statute constitutes a false or fraudulent claim for purposes of the federal civil False Claims Act. Although there are a number of statutory exemptions and regulatory safe harbors to the federal Anti-Kickback Statute protecting certain common business arrangements and activities from prosecution or regulatory sanctions, the exemptions and safe harbors are drawn narrowly, and practices that do not fit squarely within an exemption or safe harbor may be subject to scrutiny. We seek to comply with the exemptions and safe harbors whenever possible, but our practices may not in all cases meet all of the criteria for safe harbor protection from anti-kickback liability;
- the federal civil False Claims Act, which imposes civil penalties against individuals and entities for, among other things, knowingly presenting, or causing to be presented, a false or fraudulent claim for payment of government funds or knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay money to the government or knowingly concealing, or knowingly and improperly avoiding, decreasing, or concealing an obligation to pay money to the federal government. Many pharmaceutical and other healthcare companies have been investigated and have reached substantial financial settlements with the federal government under the civil False Claims Act for a variety of alleged improper marketing activities, including providing free product to customers with the expectation that the customers would bill federal programs for the product; providing consulting fees, grants, free travel, and other benefits to physicians to induce them to prescribe the company's products; and inflating prices reported to private price publication services, which are used to set drug payment rates under government healthcare programs. In addition, in recent years the government has pursued civil False Claims Act cases against a number of pharmaceutical companies for causing false claims to be submitted as a result of the marketing of their products for

unapproved, and thus non-reimbursable, uses. More recently, federal enforcement agencies are and have been investigating certain pharmaceutical companies' product and patient assistance programs, including manufacturer reimbursement support services, relationships with specialty pharmacies, and grants to independent charitable foundations. Pharmaceutical and other healthcare companies also are subject to other federal false claim laws, including, among others, federal criminal healthcare fraud and false statement statutes that extend to non-government health benefit programs;

- The federal Health Insurance Portability and Accountability Act of 1996, as amended by the Health Information Technology for Economic and Clinical Health Act, or HIPAA, imposes criminal and civil liability for executing a scheme to defraud any healthcare benefit program and also imposes obligations, with respect to safeguarding the privacy, security and transmission of individually identifiable health information;
- numerous U.S. federal and state laws and regulations, including state data breach notification laws, state health information privacy laws and federal and state consumer protection laws, govern the collection, use, disclosure and protection of personal information. Other countries also have, or are developing, laws governing the collection, use, disclosure and protection of personal information. In addition, most healthcare providers who prescribe our products and from whom we obtain patient health information are subject to privacy and security requirements under the Health Insurance Portability and Accountability Act of 1996 and by the Health Information Technology for Economic and Clinical Health Act, or HITECH, which are collectively referred to as HIPAA. We are not a HIPAA-covered entity and we do not operate as a business associate to any covered entities. Therefore, the HIPAA privacy and security requirements do not apply to us (other than potentially with respect to providing certain employee benefits). However, we could be subject to criminal penalties if we knowingly obtain individually identifiable health information from a covered entity in a manner that is not authorized or permitted by HIPAA or for aiding and abetting and/or conspiring to commit a violation of HIPAA. We are unable to predict whether our actions could be subject to prosecution in the event of an impermissible disclosure of health information to us. The legislative and regulatory landscape for privacy and data security continues to evolve, and there has been an increasing amount of focus on privacy and data security issues with the potential to affect our business. These privacy and data security laws and regulations could increase our cost of doing business, and failure to comply with these laws and regulations could result in government enforcement actions (which could include civil or criminal penalties), private litigation and/or adverse publicity and could negatively affect our operating results and business;
- analogous state laws and regulations, such as state anti-kickback and false claims laws, may apply to items or services reimbursed under Medicaid and other state programs or, in several states, apply regardless of the payor. Some state laws also require pharmaceutical companies to report expenses relating to the marketing and promotion of pharmaceutical products and to report gifts and payments to certain health care providers in the states. Other states prohibit providing meals to prescribers or other marketing-related activities. Some states restrict the ability of manufacturers to offer co-pay support to patients for certain prescription drugs. Other states and cities require identification or licensing of state representatives. In addition, California, Connecticut, Nevada, and Massachusetts require pharmaceutical companies to implement compliance programs or marketing codes of conduct. Foreign governments often have similar regulations, which we also will be subject to in those countries where we market and sell products;
- the federal Physician Payment Sunshine Act, being implemented as the Open Payments Program, requires certain pharmaceutical manufacturers to engage in extensive tracking of payments and other transfers of value to physicians and teaching hospitals, and to submit such data to Centers for Medicare and Medicaid Services within the U.S. Department of Health and Human Services, or CMS, which will then make all of this data publicly available on the CMS website. Pharmaceutical manufacturers with products for which payment is available under Medicare, Medicaid or the State Children's Health Insurance Program must submit a report to CMS on or before the 90th day of each calendar year disclosing reportable payments made in the previous calendar year; and
- the federal Foreign Corrupt Practices Act of 1977 and other similar anti-bribery laws in other jurisdictions generally prohibit companies and their intermediaries from providing money or anything

of value to officials of foreign governments, foreign political parties, or international organizations with the intent to obtain or retain business or seek a business advantage. Recently, there has been a substantial increase in anti-bribery law enforcement activity by U.S. regulators, with more frequent and aggressive investigations and enforcement proceedings by both the Department of Justice and the SEC. A determination that our operations or activities are not, or were not, in compliance with United States or foreign laws or regulations could result in the imposition of substantial fines, interruptions of business, loss of supplier, vendor or other third-party relationships, termination of necessary licenses and permits, and other legal or equitable sanctions. Other internal or government investigations or legal or regulatory proceedings, including lawsuits brought by private litigants, may also follow as a consequence.

If our operations are found to be in violation of any of the laws and regulations described above or any other governmental regulations that apply to us, we may be subject to significant civil, criminal and administrative penalties, imprisonment, damages, fines, exclusion from government-funded healthcare programs, like Medicare and Medicaid, and the curtailment or restructuring of our operations. Any penalties, damages, fines, curtailment or restructuring of our operations, or associated adverse publicity, could adversely affect our ability to operate our business and our financial results. Although compliance programs can mitigate the risk of investigation and prosecution for violations of these laws and regulations, the risks cannot be entirely eliminated. Any action against us for violation of these laws or regulations, even if we successfully defend against it, could cause us to incur significant legal expenses and divert our management's attention from the operation of our business. Moreover, achieving and sustaining compliance with applicable federal and state privacy data, security and fraud laws and regulations may prove costly.

In the EU, the advertising and promotion of our products will also be subject to EU Member States' laws concerning promotion of medicinal products, interactions with physicians, misleading and comparative advertising and unfair commercial practices, as well as other EU Member State legislation governing statutory health insurance, bribery and anti-corruption. Failure to comply with these rules can result in enforcement action by the EU Member State authorities, which may include any of the following: fines, imprisonment, orders forfeiting products or prohibiting or suspending their supply to the market, or requiring the manufacturer to issue public warnings, or to conduct a product recall.

***Significant disruptions of information technology systems or security breaches could adversely affect our business.***

We are increasingly dependent upon information technology systems, infrastructure and data to operate our business. In the ordinary course of business, we collect, store and transmit large amounts of confidential information (including but not limited to trade secrets or other intellectual property, proprietary business information and personal information). It is critical that we do so in a secure manner to maintain the confidentiality and integrity of such confidential information. We also have outsourced elements of our operations to third parties, and as a result we manage a number of third party vendors who may or could have access to our confidential information. The size and complexity of our information technology systems, and those of third party vendors with whom we contract, and the large amounts of confidential information stored on those systems, make such systems potentially vulnerable to service interruptions or to security breaches from inadvertent or intentional actions by our employees, third party vendors, and/or business partners, or from cyber-attacks by malicious third parties. Cyber-attacks are increasing in their frequency, sophistication, and intensity, and have become increasingly difficult to detect. Cyber-attacks could include the deployment of harmful malware, denial-of-service attacks, social engineering and other means to affect service reliability and threaten the confidentiality, integrity and availability of information.

Significant disruptions of our information technology systems or security breaches could adversely affect our business operations and/or result in the loss, misappropriation and/or unauthorized access, use or disclosure of, or the prevention of access to, confidential information (including but not limited to trade secrets or other intellectual property, proprietary business information and personal information), and could result in financial, legal, business and reputational harm to us. For example, any such event that leads to unauthorized access, use or disclosure of personal information, including personal information regarding patients or employees, could harm our reputation, require us to comply with federal and/or state breach notification laws and foreign law equivalents, and otherwise subject us to liability under laws and regulations that protect the privacy and security of personal information. Security breaches and other inappropriate access can be difficult to detect, and any delay in identifying

them may lead to increased harm of the type described above. While we have implemented security measures to protect our information technology systems and infrastructure, there can be no assurance that such measures will prevent service interruptions or security breaches that could adversely affect our business.

***Marketing activities for our approved drugs are subject to continued governmental regulation.***

FDA, and third-country authorities, including the competent authorities of the EU Member States, have the authority to impose significant restrictions, including REMS requirements, on approved products through regulations on advertising, promotional and distribution activities. After approval, if products are marketed in contradiction with FDA laws and regulations, FDA may issue warning letters that require specific remedial measures to be taken, as well as an immediate cessation of the impermissible conduct, resulting in adverse publicity. FDA may also require that all future promotional materials receive prior agency review and approval before use. Certain states have also adopted regulations and reporting requirements surrounding the promotion of pharmaceuticals. Qsymia and STENDRA are subject to these regulations. Failure to comply with state requirements may affect our ability to promote or sell pharmaceutical drugs in certain states. This, in turn, could have a material adverse impact on our financial results and financial condition and could subject us to significant liability, including civil and administrative remedies as well as criminal sanctions.

***We are subject to ongoing regulatory obligations and restrictions, which may result in significant expense and limit our ability to commercialize our drugs.***

We are required to comply with extensive regulations for drug manufacturing, labeling, packaging, adverse event reporting, storage, distribution, advertising, promotion and record keeping in connection with the marketing of Qsymia and STENDRA. Regulatory approvals may also be subject to significant limitations on the indicated uses or marketing of the investigational drug candidates or to whom and how we may distribute our products. Even after FDA approval is obtained, FDA may still impose significant restrictions on a drug's indicated uses or marketing or impose ongoing requirements for REMS or potentially costly post-approval studies. For example, the labeling approved for Qsymia includes restrictions on use, including recommendations for pregnancy testing, level of obesity and duration of treatment. We are subject to ongoing regulatory obligations and restrictions that may result in significant expense and limit our ability to commercialize Qsymia. FDA has also required the distribution of a Medication Guide to Qsymia patients outlining the increased risk of teratogenicity with fetal exposure and the possibility of suicidal thinking or behavior. In addition, FDA has required a REMS that may act to limit access to the drug, reduce our revenues and/or increase our costs. FDA may modify the Qsymia REMS in the future to be more or less restrictive.

In addition, Qsymia is a controlled substance and subject to DEA and state regulations relating to manufacturing, storage, record keeping, reporting, distribution and prescription procedures and requirements related to necessary DEA registrations and state licenses. The DEA periodically inspects facilities for compliance with its rules and regulations. Failure to comply with current and future regulations of the DEA, relevant state authorities or any comparable international requirements could lead to a variety of sanctions, including revocation or denial of renewal of DEA registrations, fines, injunctions, or civil or criminal penalties, and could result in, among other things, additional operating costs to us or delays in distribution of Qsymia and could have an adverse effect on our business and financial condition.

Even if we maintain FDA approval, or receive a marketing authorization from the EC, and other regulatory approvals, if we or others identify adverse side effects after any of our products are on the market, or if manufacturing problems occur, regulatory approval or EU marketing authorization may be varied, suspended or withdrawn and reformulation of our products, additional clinical trials, changes in labeling and additional marketing applications may be required, any of which could harm our business and cause our stock price to decline.

***We and our contract manufacturers are subject to significant regulation with respect to manufacturing of our products.***

All of those involved in the preparation of a therapeutic drug for clinical trials or commercial sale, including our existing supply contract manufacturers, and clinical trial investigators, are subject to extensive

regulation. Components of a finished drug product approved for commercial sale or used in late-stage clinical trials must be manufactured in accordance with current Good Manufacturing Practices, or cGMP. These regulations govern quality control of the manufacturing processes and documentation policies and procedures, and the implementation and operation of quality systems to control and assure the quality of investigational products and products approved for sale. Our facilities and quality systems and the facilities and quality systems of our third-party contractors must be inspected routinely for compliance. If any such inspection or audit identifies a failure to comply with applicable regulations or if a violation of our product specifications or applicable regulation occurs independent of such an inspection or audit, we or FDA may require remedial measures that may be costly and/or time consuming for us or a third party to implement and that may include the issuance of a warning letter, temporary or permanent suspension of a clinical trial or commercial sales, recalls, market withdrawals, seizures, or the temporary or permanent closure of a facility. Any such remedial measures would be imposed upon us or third parties with whom we contract until satisfactory cGMP compliance is achieved. FDA could also impose civil penalties. We must also comply with similar regulatory requirements of foreign regulatory agencies.

We obtain the necessary raw materials and components for the manufacture of Qsymia and STENDRA as well as certain services, such as analytical testing packaging and labeling, from third parties. In particular, we rely on Catalent to supply Qsymia capsules and Packaging Coordinators, Inc., or PCI, for Qsymia packaging services. We rely on Sanofi Chimie and Sanofi Winthrop to supply avanafil API and tablets. We and these suppliers and service providers are required to follow cGMP requirements and are subject to routine and unannounced inspections by FDA and by state and foreign regulatory agencies for compliance with cGMP requirements and other applicable regulations. Upon inspection of these facilities, FDA or foreign regulatory agencies may find the manufacturing process or facilities are not in compliance with cGMP requirements and other regulations. Because manufacturing processes are highly complex and are subject to a lengthy regulatory approval process, alternative qualified supply may not be available on a timely basis or at all.

Difficulties, problems or delays in our suppliers and service providers' manufacturing and supply of raw materials, components and services could delay our clinical trials, increase our costs, damage our reputation and cause us to lose revenue or market share if we are unable to timely meet market demands.

***If we fail to comply with our reporting and payment obligations under the Medicaid Drug Rebate program or other governmental pricing programs, we could be subject to additional reimbursement requirements, penalties, sanctions and fines, which could have a material adverse effect on our business, financial condition, results of operations and growth prospects.***

We participate in the Medicaid Drug Rebate program, established by the Omnibus Budget Reconciliation Act of 1990 and amended by the Veterans Health Care Act of 1992 as well as subsequent legislation. Under the Medicaid Drug Rebate program, we are required to pay a rebate to each state Medicaid program for our covered outpatient drugs that are dispensed to Medicaid beneficiaries and paid for by a state Medicaid program as a condition of having federal funds being made available to the states for our drugs under Medicaid and Medicare Part B. Those rebates are based on pricing data reported by us on a monthly and quarterly basis to CMS, the federal agency that administers the Medicaid Drug Rebate program. These data include the average manufacturer price and, in the case of innovator products, the best price for each drug, which, in general, represents the lowest price available from the manufacturer to any entity in the U.S. in any pricing structure, calculated to include all sales and associated rebates, discounts and other price concessions. Our failure to comply with these price reporting and rebate payment options could negatively impact our financial results.

The Affordable Care Act made significant changes to the Medicaid Drug Rebate program. Effective in March 2010, rebate liability expanded from fee-for-service Medicaid utilization to include the utilization of Medicaid managed care organizations as well. With regard to the amount of the rebates owed, the Affordable Care Act increased the minimum Medicaid rebate from 15.1% to 23.1% of the average manufacturer price for most innovator products and from 11% to 13% for non-innovator products; changed the calculation of the rebate for certain innovator products that qualify as line extensions of existing drugs; and capped the total rebate amount for innovator drugs at 100% of the average manufacturer price. In addition, the Affordable Care Act and subsequent legislation changed the definition of average manufacturer price. Finally, the Affordable Care Act requires pharmaceutical manufacturers of branded prescription drugs to pay a branded prescription drug fee to the federal government beginning in 2011. Each individual pharmaceutical manufacturer pays a prorated share of the branded

prescription drug fee of \$4.1 billion in 2018, based on the dollar value of its branded prescription drug sales to certain federal programs identified in the law.

CMS issued final regulations that became effective on April 1, 2016 to implement the changes to the Medicaid Drug Rebate program under the Affordable Care Act. Moreover, certain legislative changes to and regulatory changes under the Affordable Care Act have occurred in the 115th United States Congress and under the Trump Administration. For example, the Tax Cuts and Jobs Act enacted on December 22, 2017, eliminated the individual mandate, beginning in 2019. Additional legislative changes to and regulatory changes under the Affordable Care Act remain possible. We expect that the Affordable Care Act, as currently enacted or as it may be amended in the future, and other healthcare reform measures that may be adopted in the future, could have a material adverse effect on our industry generally and on our ability to maintain or increase sales of our existing products or to successfully commercialize our product candidates, if approved. The issuance of regulations and coverage expansion by various governmental agencies relating to the Medicaid Drug Rebate program has and will continue to increase our costs and the complexity of compliance, has been and will be time consuming, and could have a material adverse effect on our results of operations.

Federal law requires that any company that participates in the Medicaid Drug Rebate program also participate in the Public Health Service's 340B drug pricing program in order for federal funds to be available for the manufacturer's drugs under Medicaid and Medicare Part B. The 340B drug pricing program requires participating manufacturers to agree to charge statutorily defined covered entities no more than the 340B "ceiling price" for the manufacturer's covered outpatient drugs. These 340B covered entities include a variety of community health clinics and other entities that receive health services grants from the Public Health Service, as well as hospitals that serve a disproportionate share of low-income patients. The 340B ceiling price is calculated using a statutory formula, which is based on the average manufacturer price and rebate amount for the covered outpatient drug as calculated under the Medicaid Drug Rebate program. Changes to the definition of average manufacturer price and the Medicaid rebate amount under the Affordable Care Act and CMS's issuance of final regulations implementing those changes also could affect our 340B ceiling price calculations and negatively impact our results of operations.

The Affordable Care Act expanded the 340B program to include additional entity types: certain free-standing cancer hospitals, critical access hospitals, rural referral centers and sole community hospitals, each as defined by the Affordable Care Act, but exempts "orphan drugs" from the ceiling price requirements for these covered entities. The Affordable Care Act also obligates the Secretary of the U.S. Department of Health and Human Services, or HHS, to update the agreement that manufacturers must sign to participate in the 340B program to obligate a manufacturer to offer the 340B price to covered entities if the manufacturer makes the drug available to any other purchaser at any price and to report to the government the ceiling prices for its drugs. The Health Resources and Services Administration, or HRSA, the agency that administers the 340B program, recently updated the agreement with participating manufacturers. The Affordable Care Act also obligates the Secretary of HHS to create regulations and processes to improve the integrity of the 340B program. On January 5, 2017, HRSA issued a final regulation regarding the calculation of 340B ceiling price and the imposition of civil monetary penalties on manufacturers that knowingly and intentionally overcharge covered entities. The effective date of the regulation has been delayed until July 1, 2018. Implementation of this final rule and the issuance of any other final regulations and guidance could affect our obligations under the 340B program in ways we cannot anticipate. In addition, legislation may be introduced that, if passed, would further expand the 340B program to additional covered entities or would require participating manufacturers to agree to provide 340B discounted pricing on drugs used in an inpatient setting.

Pricing and rebate calculations vary among products and programs. The calculations are complex and are often subject to interpretation by us, governmental or regulatory agencies and the courts. The Medicaid rebate amount is computed each quarter based on our submission to CMS of our current average manufacturer prices and best prices for the quarter. If we become aware that our reporting for a prior quarter was incorrect, or has changed as a result of recalculation of the pricing data, we are obligated to resubmit the corrected data for a period not to exceed 12 quarters from the quarter in which the data originally were due. Such restatements and recalculations increase our costs for complying with the laws and regulations governing the Medicaid Drug Rebate program. Any corrections to our rebate calculations could result in an overage or underage in our rebate liability for past quarters, depending on the nature of the correction. Price recalculations also may affect the ceiling price at which we are required to offer our products to certain covered entities, such as safety-net providers, under the 340B drug discount program.

We are liable for errors associated with our submission of pricing data. In addition to retroactive rebates and the potential for 340B program refunds, if we are found to have knowingly submitted false average manufacturer price or best price information to the government, we may be liable for civil monetary penalties in the amount of \$181,071 per item of false information. Our failure to submit monthly/quarterly average manufacturer price and best price data on a timely basis could result in a civil monetary penalty of \$18,107 per day for each day the information is late beyond the due date. Such failure also could be grounds for CMS to terminate our Medicaid drug rebate agreement, pursuant to which we participate in the Medicaid program. In the event that CMS terminates our rebate agreement, no federal payments would be available under Medicaid or Medicare Part B for our covered outpatient drugs.

In September 2010, CMS and the Office of the Inspector General indicated that they intend to pursue more aggressively companies that fail to report these data to the government in a timely manner. Governmental agencies may also make changes in program interpretations, requirements or conditions of participation, some of which may have implications for amounts previously estimated or paid. We cannot assure you that our submissions will not be found by CMS to be incomplete or incorrect.

If we misstate Non-FAMPs or FCPs, we must restate these figures. Additionally, pursuant to the VHCA, knowing provision of false information in connection with a Non-FAMP filing can subject us to penalties of \$181,071 for each item of false information. If we overcharge the government in connection with our FSS contract or the Tricare Retail Pharmacy Program, whether due to a misstated FCP or otherwise, we are required to refund the difference to the government. Failure to make necessary disclosures and/or to identify contract overcharges can result in allegations against us under the False Claims Act and other laws and regulations. Unexpected refunds to the government, and responding to a government investigation or enforcement action, would be expensive and time-consuming, and could have a material adverse effect on our business, financial condition, results of operations and growth prospects.

***Changes in reimbursement procedures by government and other third-party payors, including changes in healthcare law and implementing regulations, may limit our ability to market and sell our approved drugs, or any future drugs, if approved, may limit our product revenues and delay profitability, and may impact our business in ways that we cannot currently predict. These changes could have a material adverse effect on our business and financial condition.***

In the U.S. and abroad, sales of pharmaceutical drugs are dependent, in part, on the availability of reimbursement to the consumer from third-party payors, such as government and private insurance plans. Third-party payors are increasingly challenging the prices charged for medical products and services. Some third-party payor benefit packages restrict reimbursement, charge co-pays to patients, or do not provide coverage for specific drugs or drug classes.

In addition, certain healthcare providers are moving towards a managed care system in which such providers contract to provide comprehensive healthcare services, including prescription drugs, for a fixed cost per person. We are unable to predict the reimbursement policies employed by third-party healthcare payors.

Payors also are increasingly considering new metrics as the basis for reimbursement rates, such as average sales price, average manufacturer price and Actual Acquisition Cost. CMS, the federal agency that administers Medicare and the Medicaid Drug Rebate program, surveys and publishes retail community pharmacy acquisition cost information in the form of National Average Drug Acquisition Cost, or NADAC, files to provide state Medicaid agencies with a basis of comparison for their own reimbursement and pricing methodologies and rates. It is difficult to project the impact of these evolving reimbursement mechanics on the willingness of payors to cover our products.

The healthcare industry in the U.S. and abroad is undergoing fundamental changes that are the result of political, economic and regulatory influences. The levels of revenue and profitability of pharmaceutical companies may be affected by the continuing efforts of governmental and third-party payors to contain or reduce healthcare costs through various means. Reforms that have been and may be considered include mandated basic healthcare benefits, controls on healthcare spending through limitations on the increase in private health insurance premiums and the types of drugs eligible for reimbursement and Medicare and Medicaid spending, the creation of large insurance purchasing groups, and fundamental changes to the healthcare delivery system. These proposals include measures that would limit or prohibit payments for some medical treatments or subject the pricing of drugs to government control and regulations changing the rebates we are required to provide. Further, federal budgetary

concerns could result in the implementation of significant federal spending cuts, including cuts in Medicare and other health related spending in the near-term. For example, beginning April 1, 2013, Medicare payments for all items and services, including drugs and biologics, were reduced by 2% under the sequestration (i.e., automatic spending reductions) required by the Budget Control Act of 2011, as amended by the American Taxpayer Relief Act of 2012. Subsequent legislation extended the 2% reduction, on average, to 2025. These cuts reduce reimbursement payments related to our products, which could potentially negatively impact our revenue.

In March 2010, the President signed the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, collectively referred to in this report as the Affordable Care Act. The Affordable Care Act substantially changed the way healthcare is financed by both governmental and private insurers, and could have a material adverse effect on our future business, cash flows, financial condition and results of operations, including by operation of the following provisions:

- Effective in March 2010, rebate liability expanded from fee-for-service Medicaid utilization to include the utilization of Medicaid managed care organizations as well. This expanded eligibility affects rebate liability for that utilization.
- With regard to the amount of the rebates owed, the Affordable Care Act increased the minimum Medicaid rebate from 15.1% to 23.1% of the average manufacturer price for most innovator products and from 11% to 13% for non-innovator products; changed the calculation of the rebate for certain innovator products that qualify as line extensions of existing drugs; and capped the total rebate amount for innovator drugs at 100% of the average manufacturer price.
- Effective in January 2011, pharmaceutical companies must provide a 50% discount on branded prescription drugs dispensed to beneficiaries within the Medicare Part D coverage gap or “donut hole,” which is a coverage gap that currently exists in the Medicare Part D prescription drug program. We currently do not have coverage under Medicare Part D for our drugs, but this could change in the future.
- Effective in January 2011, the Affordable Care Act requires pharmaceutical manufacturers of branded prescription drugs to pay a branded prescription drug fee to the federal government. Each individual pharmaceutical manufacturer pays a prorated share of the branded prescription drug fee of \$4.1 billion in 2018, based on the dollar value of its branded prescription drug sales to certain federal programs identified in the law.
- Some states have elected to expand their Medicaid programs by raising the income limit to 133% of the federal poverty level. For each state that does not choose to expand its Medicaid program, there may be fewer insured patients overall, which could impact our sales, business and financial condition. We expect any Medicaid expansion to impact the number of adults in Medicaid more than children because many states have already set their eligibility criteria for children at or above the level designated in the Affordable Care Act. An increase in the proportion of patients who receive our drugs and who are covered by Medicaid could adversely affect our net sales.

CMS issued final regulations that became effective on April 1, 2016 to implement the changes to the Medicaid Drug Rebate Program under the Affordable Care Act.

There can be no assurance that future healthcare legislation or other changes in the administration or interpretation of government healthcare or third-party reimbursement programs will not have a material adverse effect on us. Healthcare reform is also under consideration in other countries where we intend to market Qsymia. Moreover, certain legislative changes to and regulatory changes under the Affordable Care Act have occurred in the 115th United States Congress and under the Trump Administration. For example, the Tax Cuts and Jobs Act enacted on December 22, 2017, eliminated the individual mandate, beginning in 2019. Additional legislative changes to and regulatory changes under the Affordable Care Act remain possible. We expect that the Affordable Care Act, as currently enacted or as it may be amended in the future, and other healthcare reform measures that may be adopted in the future, could have a material adverse effect on our industry generally and on our ability to maintain or increase sales of our existing products or to successfully commercialize our product candidates, if approved.

We expect to experience pricing and reimbursement pressures in connection with the sale of Qsymia, STENDRA and our investigational drug candidates, if approved, due to the trend toward managed healthcare, the increasing influence of health maintenance organizations and additional legislative proposals. In addition, we may

confront limitations in insurance coverage for Qsymia, STENDRA and our investigational drug candidates. For example, the Medicare program generally does not provide coverage for drugs used to treat erectile dysfunction or drugs used to treat obesity. Similarly, other insurers may determine that such products are not covered under their programs. If we fail to successfully secure and maintain reimbursement coverage for our approved drugs and investigational drug candidates or are significantly delayed in doing so, we will have difficulty achieving market acceptance of our approved drugs and investigational drug candidates and our business will be harmed. Congress has enacted healthcare reform and may enact further reform, which could adversely affect the pharmaceutical industry as a whole, and therefore could have a material adverse effect on our business.

Both of the active pharmaceutical ingredients in Qsymia, phentermine and topiramate, are available as single ingredient generic products and do not have a REMS requirement. The exact doses of the active ingredients in Qsymia are different than those currently available for the generic components. State pharmacy laws prohibit pharmacists from substituting drugs with differing doses and formulations. The safety and efficacy of Qsymia is dependent on the titration, dosing and formulation, which we believe could not be easily duplicated, if at all, with the use of generic substitutes. However, there can be no assurance that we will be able to provide for optimal reimbursement of Qsymia as a treatment for obesity or, if approved, for any other indication, from third-party payors or the U.S. government. Furthermore, there can be no assurance that healthcare providers would not actively seek to provide patients with generic versions of the active ingredients in Qsymia in order to treat obesity at a potential lower cost and outside of the REMS requirements.

An increasing number of EU Member States and other foreign countries use prices for medicinal products established in other countries as “reference prices” to help determine the price of the product in their own territory. Consequently, a downward trend in prices of medicinal products in some countries could contribute to similar downward trends elsewhere. In addition, the ongoing budgetary difficulties faced by a number of EU Member States, including Greece and Spain, have led and may continue to lead to substantial delays in payment and payment partially with government bonds rather than cash for medicinal products, which could negatively impact our revenues and profitability. Moreover, in order to obtain reimbursement of our medicinal products in some countries, including some EU Member States, we may be required to conduct clinical trials that compare the cost effectiveness of our products to other available therapies. There can be no assurance that our medicinal products will obtain favorable reimbursement status in any country.

***Setbacks and consolidation in the pharmaceutical and biotechnology industries, and our, or our collaborators’, inability to obtain third-party coverage and adequate reimbursement, could make partnering more difficult and diminish our revenues.***

Setbacks in the pharmaceutical and biotechnology industries, such as those caused by safety concerns relating to high-profile drugs like Avandia®, Vioxx® and Celebrex®, or investigational drug candidates, as well as competition from generic drugs, litigation, and industry consolidation, may have an adverse effect on us. For example, pharmaceutical companies may be less willing to enter into new collaborations or continue existing collaborations if they are integrating a new operation as a result of a merger or acquisition or if their therapeutic areas of focus change following a merger. Moreover, our and our collaborators’ ability to commercialize any of our approved drugs or future investigational drug candidates will depend in part on government regulation and the availability of coverage and adequate reimbursement from third-party payors, including private health insurers and government payors, such as the Medicaid and Medicare programs, increases in government-run, single-payor health insurance plans and compulsory licenses of drugs. Government and third-party payors are increasingly attempting to contain healthcare costs by limiting coverage and reimbursement levels for new drugs. Given the continuing discussion regarding the cost of healthcare, managed care, universal healthcare coverage and other healthcare issues, we cannot predict with certainty what additional healthcare initiatives, if any, will be implemented or the effect any future legislation or regulation will have on our business. These efforts may limit our commercial opportunities by reducing the amount a potential collaborator is willing to pay to license our programs or investigational drug candidates in the future due to a reduction in the potential revenues from drug sales. Adoption of legislation and regulations could limit pricing approvals for, and reimbursement of, drugs. A government or third-party payor decision not to approve pricing for, or provide adequate coverage and reimbursements of, our drugs could limit market acceptance of these drugs.

***Our business and operations would suffer in the event of system failures.***

Despite the implementation of security measures, our internal computer systems and those of our contract sales organization, or CSO, CROs, safety monitoring company and other contractors and consultants are vulnerable to damage from computer viruses, unauthorized access, natural disasters, accidents, terrorism, war and telecommunication and electrical failures. While we have not experienced any such system failure, accident or security breach to date, if such an event were to occur and cause interruptions in our operations, it could result in a material disruption of our investigational drug candidate development programs and drug manufacturing operations. For example, the loss of clinical trial data from completed or ongoing clinical trials for our investigational drug candidates could result in delays in our regulatory approval efforts with FDA, the EC, or the competent authorities of the EU Member States, and significantly increase our costs to recover or reproduce the data. To the extent that any disruption or security breach was to result in a loss of or damage to our data or applications, or inappropriate disclosure of confidential or proprietary information, we could incur liability and the further development of our investigational drug candidates, or commercialization of our approved drugs, could be delayed. If we are unable to restore our information systems in the event of a systems failure, our communications, daily operations and the ability to develop our investigational drug candidates and approved drug commercialization efforts would be severely affected.

***Natural disasters or resource shortages could disrupt our investigational drug candidate development and approved drug commercialization efforts and adversely affect results.***

Our ongoing or planned clinical trials and approved drug commercialization efforts could be delayed or disrupted indefinitely upon the occurrence of a natural disaster. For example, Hurricane Sandy in October 2012, hindered our Qsymia sales efforts. In 2005, our clinical trials in the New Orleans area were interrupted by Hurricane Katrina. In addition, our offices are located in the San Francisco Bay Area near known earthquake fault zones and are therefore vulnerable to damage from earthquakes. In October 1989, a major earthquake in our area caused significant property damage and a number of fatalities. We are also vulnerable to damage from other disasters, such as power loss, fire, floods and similar events. If a significant disaster occurs, our ability to continue our operations could be seriously impaired and we may not have adequate insurance to cover any resulting losses. Any significant unrecoverable losses could seriously impair our operations and financial condition.

**Risks Relating to our Intellectual Property*****Obtaining intellectual property rights is a complex process, and we may be unable to adequately protect our proprietary technologies.***

We hold various patents and patent applications in the U.S. and abroad targeting obesity and morbidities related to obesity, including sleep apnea and diabetes, and sexual health, among other indications. The procedures for obtaining a patent in the U.S. and in most foreign countries are complex. These procedures require an analysis of the scientific technology related to the invention and many sophisticated legal issues. Consequently, the process for having our pending patent applications issue as patents will be difficult, complex and time consuming. We do not know when, or if, we will obtain additional patents for our technologies, or if the scope of the patents obtained will be sufficient to protect our investigational drug candidates or products, or be considered sufficient by parties reviewing our patent positions pursuant to a potential licensing or financing transaction.

In addition, we cannot make assurances as to how much protection, if any, will be provided by our issued patents. Our existing patents and any future patents we obtain may not be sufficiently broad to prevent others from practicing our technologies or from developing competing products. Others may independently develop similar or alternative technologies or design around our patented technologies or products. These companies would then be able to develop, manufacture and sell products that compete directly with our products. In that case, our revenues and operating results could decline.

Other entities may also challenge the validity or enforceability of our patents and patent applications in litigation or administrative proceedings. The sponsor of a generic application seeking to rely on one of our approved drug products as the reference listed drug must make one of several certifications regarding each listed patent. A

“Paragraph III” certification is the sponsor’s statement that it will wait for the patent to expire before obtaining approval for its product. A “Paragraph IV” certification is a challenge to the patent; it is an assertion that the patent does not block approval of the later product, either because the patent is invalid or unenforceable or because the patent, even if valid, is not infringed by the new product. Once FDA accepts for filing a generic application containing a Paragraph IV certification, the applicant must within 20 days provide notice to the reference listed drug, or RLD, NDA holder and patent owner that the application with patent challenge has been submitted, and provide the factual and legal basis for the applicant’s assertion that the patent is invalid or not infringed. If the NDA holder or patent owner file suit against the generic applicant for patent infringement within 45 days of receiving the Paragraph IV notice, FDA is prohibited from approving the generic application for a period of 30 months from the date of receipt of the notice. If the RLD has new chemical entity exclusivity and the notice is given and suit filed during the fifth year of exclusivity, the 30-month stay does not begin until five years after the RLD approval. FDA may approve the proposed product before the expiration of the 30-month stay if a court finds the patent invalid or not infringed or if the court shortens the period because the parties have failed to cooperate in expediting the litigation. If a competitor or a generic pharmaceutical provider successfully challenges our patents, the protection provided by these patents could be reduced or eliminated and our ability to commercialize any approved drugs would be at risk. In addition, if a competitor or generic manufacturer were to receive approval to sell a generic or follow-on version of one of our products, our approved product would become subject to increased competition and our revenues for that product would be adversely affected.

We also may rely on trade secrets and other unpatented confidential information to protect our technology, especially where we do not believe patent protection is appropriate or obtainable. However, trade secrets are difficult to protect. We seek to protect our trade secrets and other confidential information by entering into confidentiality agreements with employees, collaborators, vendors (including CROs and our CSO), consultants and, at times, potential investors. Nevertheless, employees, collaborators, vendors, consultants or potential investors may still disclose or misuse our trade secrets and other confidential information, and we may not be able to meaningfully protect our trade secrets. In addition, others may independently develop substantially equivalent information or techniques or otherwise gain access to our trade secrets. Disclosure or misuse of our confidential information would harm our competitive position and could cause our revenues and operating results to decline.

If we believe that others have infringed or misappropriated our proprietary rights, we may need to institute legal action to protect our intellectual property rights. Such legal action may be expensive, and we may not be able to afford the costs of enforcing or defending our intellectual property rights against others.

***We may receive additional notices of ANDA filings for Qsymia submitted by generic drug companies asserting that generic forms of Qsymia would not infringe on our issued patents. As a result of these potential filings, we may commence additional litigation to defend our patent rights, which would result in additional litigation costs and, depending on the outcome of the litigation, might result in competition from lower cost generic or follow-on products earlier than anticipated.***

Qsymia is approved under the provisions of the Federal Food, Drug and Cosmetic Act, or FDCA, which renders it susceptible to potential competition from generic manufacturers via the Hatch-Waxman Act and ANDA process. The ANDA procedure includes provisions allowing generic manufacturers to challenge the innovator’s patent protection by submitting “Paragraph IV” certifications to FDA in which the generic manufacturer claims that the innovator’s patent is invalid, unenforceable and/or will not be infringed by the manufacture, use, or sale of the generic product. A patent owner who receives a Paragraph IV certification may choose to sue the generic applicant for patent infringement.

We received Paragraph IV certification notices from Actavis Laboratories FL, Inc. contending that patents listed in the Orange Book for Qsymia are invalid, unenforceable and/or will not be infringed by the manufacture, use, or sale of a generic form of Qsymia. In response to these notices, we filed suit against Actavis Laboratories FL, Inc., Actavis, Inc., and Actavis PLC, collectively referred to as Actavis, to defend our patent rights.

On June 29, 2017, the Company entered into a settlement agreement with Actavis resolving the suit against Actavis. On July 5, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

We received Paragraph IV certification notices from Teva Pharmaceutical USA, Inc. and Teva Pharmaceutical Industries, Ltd. (collectively, Teva) contending that patents listed in the Orange Book for Qsymia are invalid, unenforceable and/or will not be infringed by the manufacture, use or sale of a generic form of Qsymia. In response to these notices, we filed suit against Teva to defend our patent rights. On September 27, 2016, Dr. Reddy's Laboratories, S.A. and Dr. Reddy's Laboratories, Inc., collectively referred to as DRL, were substituted for Teva as defendants in the lawsuit.

On August 28, 2017, the Company entered into a settlement agreement with DRL resolving the suit against DRL. On September 6, 2017, the U.S. District Court for the District of New Jersey entered an order dismissing the suit. In accordance with legal requirements, we have submitted the settlement agreement to the U.S. Federal Trade Commission and the U.S. Department of Justice for review.

The settlement agreements with Actavis and DRL resolve all patent litigation brought by VIVUS against generic pharmaceutical companies that have filed ANDAs seeking approval to market generic versions of Qsymia.

The settlement agreement with Actavis will permit Actavis to begin selling a generic version of Qsymia on December 1, 2024, or earlier under certain circumstances. The settlement with DRL will permit DRL to begin selling a generic version of Qsymia on June 1, 2025, or earlier under certain circumstances. It is possible that one or more additional companies may file an ANDA and could receive FDA approval to market a generic version of Qsymia before the entry dates specified in our settlement agreements with Actavis and DRL, including if it is determined that the generic product does not infringe our patents, or that our patents are invalid or unenforceable. Although we intend to vigorously enforce our intellectual property rights relating to Qsymia, in the event there is a future ANDA filer, there can be no assurance that we will prevail in a future defense of our patent rights. If a generic version of Qsymia is introduced, Qsymia would become subject to increased competition and our revenue would be adversely affected.

***We may be sued for infringing the intellectual property rights of others, which could be costly and result in delays or termination of our future research, development, manufacturing and sales activities.***

Our commercial success also depends, in part, upon our ability to develop future investigational drug candidates, market and sell approved drugs and conduct our other research, development and commercialization activities without infringing or misappropriating the patents and other proprietary rights of others. There are many patents and patent applications owned by others that could be relevant to our business. For example, there are numerous U.S. and foreign issued patents and pending patent applications owned by others that are related to the therapeutic areas in which we have approved drugs or future investigational drug candidates as well as the therapeutic targets to which these drugs and candidates are directed. There are also numerous issued patents and patent applications covering chemical compounds or synthetic processes that may be necessary or useful to use in our research, development, manufacturing or commercialization activities. Because patent applications can take many years to issue, there may be currently pending applications, unknown to us, which may later result in issued patents that our approved drugs, future investigational drug candidates or technologies may infringe. There also may be existing patents, of which we are not aware, that our approved drugs, investigational drug candidates or technologies may infringe. Further, it is not always clear to industry participants, including us, which patents cover various types of products or methods. The coverage of patents is subject to interpretation by the courts, and the interpretation is not always uniform. We cannot assure you that others holding any of these patents or patent applications will not assert infringement claims against us for damages or seek to enjoin our activities. If we are sued for patent infringement, we would need to demonstrate that our products or methods do not infringe the patent claims of the relevant patent and/or that the patent claims are invalid or unenforceable, and we may not be able to do this.

There can be no assurance that approved drugs or future investigational drug candidates do not or will not infringe on the patents or proprietary rights of others. In addition, third parties may already own or may obtain patents in the future and claim that use of our technologies infringes these patents.

If a person or entity files a legal action or administrative action against us, or our collaborators, claiming that our drug discovery, development, manufacturing or commercialization activities infringe a patent owned by the person or entity, we could incur substantial costs and diversion of the time and attention of management and technical personnel in defending ourselves against any such claims. Furthermore, parties making claims against us may be able to obtain injunctive or other equitable relief that could effectively block our ability to further develop,

commercialize and sell any current or future approved drugs, and such claims could result in the award of substantial damages against us. In the event of a successful claim of infringement against us, we may be required to pay damages and obtain one or more licenses from third parties. We may not be able to obtain these licenses at a reasonable cost, if at all. In that case, we could encounter delays in product introductions while we attempt to develop alternative investigational drug candidates or be required to cease commercializing any affected current or future approved drugs and our operating results would be harmed.

Furthermore, because of the substantial amount of pre-trial document and witness discovery required in connection with intellectual property litigation, there is a risk that some of our confidential information could be compromised by disclosure during this type of litigation. In addition, during the course of this kind of litigation, there could be public announcements of the results of hearings, motions or other interim proceedings or developments. If securities analysts or investors perceive these results to be negative, it could have a substantial adverse effect on the trading price of our common stock.

***We may face additional competition outside of the U.S. as a result of a lack of patent coverage in some territories and differences in patent prosecution and enforcement laws in foreign countries.***

Filing, prosecuting, defending and enforcing patents on all of our drug discovery technologies and all of our approved drugs and potential investigational drug candidates throughout the world would be prohibitively expensive. While we have filed patent applications in many countries outside the U.S., and have obtained some patent coverage for approved drugs in certain foreign countries, we do not currently have widespread patent protection for these drugs outside the U.S. and have no protection in many foreign jurisdictions. Competitors may use our technologies to develop their own drugs in jurisdictions where we have not obtained patent protection. These drugs may compete with our approved drugs or future investigational drug candidates and may not be covered by any of our patent claims or other intellectual property rights.

Even if international patent applications ultimately issue or receive approval, it is likely that the scope of protection provided by such patents will be different from, and possibly less than, the scope provided by our corresponding U.S. patents. The success of our international market opportunity is dependent upon the enforcement of patent rights in various other countries. A number of countries in which we have filed or intend to file patent applications have a history of weak enforcement and/or compulsory licensing of intellectual property rights. Moreover, the legal systems of certain countries, particularly certain developing countries, do not favor the aggressive enforcement of patents and other intellectual property protection, particularly those relating to biotechnology and/or pharmaceuticals, which make it difficult for us to stop the infringement of our patents. Even if we have patents issued in these jurisdictions, there can be no assurance that our patent rights will be sufficient to prevent generic competition or unauthorized use.

Attempting to enforce our patent rights in foreign jurisdictions could result in substantial cost and divert our efforts and attention from other aspects of our business.

## **Risks Relating to our Financial Position and Need for Financing**

***We may require additional capital for our future operating plans and debt servicing requirements, and we may not be able to secure the requisite additional funding on acceptable terms, or at all, which would force us to delay, reduce or eliminate commercialization or development efforts.***

We expect that our existing capital resources combined with future anticipated cash flows will be sufficient to support our operating activities at least through the next twelve months. However, we anticipate that we will be required to obtain additional financing to fund our commercialization efforts, additional clinical studies for approved products, the development of our research and development pipeline and the servicing requirements of our debt. Our future capital requirements will depend upon numerous factors, including:

- our ability to expand the use of Qsymia through targeted patient and physician education;
- our ability to obtain marketing authorization by the EC for Qsiva in the EU;
- our ability to manage costs;

- the cost required to maintain the REMS program for Qsymia;
- the cost, timing and outcome of the post-approval clinical studies FDA has required us to perform as part of the approval for Qsymia;
- our ability, along with our collaboration partners, to successfully commercialize STENDRA/SPEDRA;
- our ability to successfully commercialize STENDRA/SPEDRA through a third party in other territories in which we do not currently have a commercial collaboration;
- the progress and costs of our research and development programs;
- the scope, timing, costs and results of pre-clinical, clinical and retrospective observational studies and trials;
- the cost of access to electronic records and databases that allow for retrospective observational studies;
- patient recruitment and enrollment in future clinical trials;
- the costs involved in seeking regulatory approvals for future drug candidates;
- the costs involved in filing and pursuing patent applications, defending and enforcing patent claims;
- the establishment of collaborations, sublicenses and strategic alliances and the related costs, including milestone payments;
- the cost of manufacturing and commercialization activities and arrangements;
- the level of resources devoted to our future sales and marketing capabilities;
- the cost, timing and outcome of litigation, if any;
- the impact of healthcare reform, if any, imposed by the federal government; and
- the activities of competitors.

Future capital requirements will also depend on the extent to which we acquire or invest in additional businesses, products and technologies. On January 6, 2017, we entered into a Patent Assignment Agreement with Selten whereby we received exclusive, worldwide rights for the development and commercialization of BMPR2 activators for the treatment of PAH and related vascular diseases. We paid Selten an upfront payment of \$1.0 million, and we will pay additional milestone payments based on global development status and future sales milestones, as well as tiered royalty payments on future sales of these compounds. The total potential milestone payments are \$39.6 million.

To obtain additional capital when needed, we will evaluate alternative financing sources, including, but not limited to, the issuance of equity or debt securities, corporate alliances, joint ventures and licensing agreements. However, there can be no assurance that funding will be available on favorable terms, if at all. We are continually evaluating our existing portfolio and we may choose to divest, sell or spin-off one or more of our drugs and/or investigational drug candidates at any time. We cannot assure you that our drugs will generate revenues sufficient to enable us to earn a profit. If we are unable to obtain additional capital, management may be required to explore alternatives to reduce cash used by operating activities, including the termination of research and development efforts that may appear to be promising to us, the sale of certain assets and the reduction in overall operating activities. If adequate funds are not available, we may be required to delay, reduce the scope of or eliminate one or more of our development programs or our commercialization efforts.

***Raising additional funds by issuing securities will cause dilution to existing stockholders and raising funds through lending and licensing arrangements may restrict our operations or require us to relinquish proprietary rights.***

To the extent that we raise additional capital by issuing equity securities, our existing stockholders' ownership will be diluted. We have financed our operations, and we expect to continue to finance our operations, primarily by issuing equity and debt securities. Moreover, any issuances by us of equity securities may be at or

below the prevailing market price of our common stock and in any event may have a dilutive impact on your ownership interest, which could cause the market price of our common stock to decline. To raise additional capital, we may choose to issue additional securities at any time and at any price.

As of March 31, 2018, we have \$250.0 million in 4.5% Convertible Senior Notes due May 1, 2020, which we refer to as the Convertible Notes. The Convertible Notes are convertible into approximately 16,826,000 shares of our common stock under certain circumstances prior to maturity at a conversion rate of 67.3038 shares per \$1,000 principal amount of Convertible Notes, which represents a conversion price of approximately \$14.858 per share, subject to adjustment under certain conditions. On October 8, 2015, IEH Biopharma LLC, a subsidiary of Icahn Enterprises L.P., announced that it had received tenders for \$170,165,000 of the aggregate principal amount of our Convertible Notes in its previously announced cash tender offer for any and all of the outstanding Convertible Notes. The Convertible Notes are convertible at the option of the holders under certain conditions at any time prior to the close of business on the business day immediately preceding November 1, 2019. Investors in our common stock will be diluted to the extent the Convertible Notes are converted into shares of our common stock, rather than being settled in cash.

In April 2018, we entered into an agreement for a new \$120 million senior secured note with Athyrium Capital Management, LP, or Athyrium Notes. \$110 million of the Athyrium Notes will be available upon the closing of the PANCREAZE acquisition, with the remaining \$10 million available for drawing upon meeting certain EBITDA thresholds or purchasing our outstanding convertible notes. Payments on the Athyrium Notes bear interest at 10.375% and will be interest-only for the first 36 months, thereafter the notes will be repaid in 36 equal monthly payments. Concurrently, we will repurchase Convertible Notes held by Athyrium, with a face value of \$60 million, for \$51 million. We continue our evaluation of alternatives for addressing our remaining convertible notes due in May 2020, which will total \$190 million upon closing of the repurchase from Athyrium.

We may also raise additional capital through the incurrence of debt, and the holders of any debt we may issue would have rights superior to our stockholders' rights in the event we are not successful and are forced to seek the protection of bankruptcy laws.

In addition, debt financing typically contains covenants that restrict operating activities. For example, on March 25, 2013, we entered into the Purchase and Sale Agreement with BioPharma Secured Investments III Holdings Cayman LP, or BioPharma, which provides for the purchase of a debt-like instrument. Under the BioPharma Agreement, we may not (i) incur indebtedness greater than a specified amount, (ii) pay a dividend or other cash distribution on our capital stock, unless we have cash and cash equivalents in excess of a specified amount, (iii) amend or restate our certificate of incorporation or bylaws unless such amendments or restatements do not affect BioPharma's interests under the BioPharma Agreement, (iv) encumber the collateral, or (v) abandon certain patent rights, in each case without the consent of BioPharma. Any future debt financing we enter into may involve similar or more onerous covenants that restrict our operations.

If we raise additional capital through collaboration, licensing or other similar arrangements, it may be necessary to relinquish potentially valuable rights to our drugs or future investigational drug candidates, potential products or proprietary technologies, or grant licenses on terms that are not favorable to us. If adequate funds are not available, our ability to achieve profitability or to respond to competitive pressures would be significantly limited and we may be required to delay, significantly curtail or eliminate the commercialization of one or more of our approved drugs or the development of one or more of our future investigational drug candidates.

***The investment of our cash balance and our available-for-sale securities are subject to risks that may cause losses and affect the liquidity of these investments.***

At March 31, 2018, we had \$209.1 million in cash, cash equivalents and available-for-sale securities. While at March 31, 2018, our excess cash balances were invested in money market, U.S. Treasury securities and corporate debt securities, our investment policy as approved by our Board of Directors, also provides for investments in debt securities of U.S. government agencies, corporate debt securities and asset-backed securities. Our investment policy has the primary investment objectives of preservation of principal. However, there may be times when certain of the securities in our portfolio will fall below the credit ratings required in the policy. These factors could impact the liquidity or valuation of our available-for-sale securities, all of which were invested in U.S. Treasury securities or corporate debt securities as of March 31, 2018. If those securities are downgraded or impaired we would experience losses in the value of our portfolio which would have an adverse effect on our results of operations, liquidity and

financial condition. An investment in money market mutual funds is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although money market mutual funds seek to preserve the value of the investment at \$1 per share, it is possible to lose money by investing in money market mutual funds.

***Our involvement in securities-related class action and shareholder litigation could divert our resources and management's attention and harm our business.***

The stock markets have from time to time experienced significant price and volume fluctuations that have affected the market prices for the common stock of pharmaceutical companies. These broad market fluctuations may cause the market price of our common stock to decline. In the past, securities-related class action litigation has often been brought against a company following a decline in the market price of its securities. This risk is especially relevant for us because biotechnology and biopharmaceutical companies often experience significant stock price volatility in connection with their investigational drug candidate development programs, the review of marketing applications by regulatory authorities and the commercial launch of newly approved drugs. We were a defendant in federal and consolidated state shareholder derivative lawsuits. These securities-related class action lawsuits generally alleged that we and our officers misled the investing public regarding the safety and efficacy of Qsymia and the prospects for FDA's approval of the Qsymia NDA as a treatment for obesity. Securities-related class action litigation often is expensive and diverts management's attention and our financial resources, which could adversely affect our business.

For example, on March 27, 2014, Mary Jane and Thomas Jasin, who purport to be purchasers of VIVUS common stock, filed an Amended Complaint in Santa Clara County Superior Court alleging securities fraud against us and three of our former officers and directors. In that complaint, captioned Jasin v. VIVUS, Inc., Case No. 114 cv 261427, plaintiffs asserted claims under California's securities and consumer protection securities statutes. Plaintiffs alleged generally that defendants misrepresented the prospects for our success, including with respect to the launch of Qsymia, while purportedly selling VIVUS stock for personal profit. Plaintiffs alleged losses of "at least" \$2.8 million, and sought damages and other relief. On July 18, 2014, the same plaintiffs filed a complaint in the United States District Court for the Northern District of California, captioned Jasin v. VIVUS, Inc., Case No. 5:14 cv 03263. The Jasins' federal complaint alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended, based on facts substantially similar to those alleged in their state court action. On September 15, 2014, pursuant to an agreement between the parties, plaintiffs voluntarily dismissed their state court action with prejudice. Defendants moved to dismiss the federal action and moved to dismiss again after plaintiffs amended their complaint to include additional factual allegations and to add seven new claims under California law. The court granted the latter motion on June 18, 2015, dismissing the seven California claims with prejudice and dismissing the two federal claims with leave to amend. Plaintiffs filed a Second Amended Complaint on August 17, 2015. Defendants moved to dismiss that complaint as well. On April 19, 2016, the court granted defendants' motion to dismiss with prejudice and entered judgment in favor of defendants. Plaintiffs filed a notice of appeal to the Ninth Circuit Court of Appeals on May 18, 2016. The Ninth Circuit issued a decision on January 16, 2018, affirming the district court's dismissal of the action. The deadline for Plaintiffs to seek rehearing in the Ninth Circuit and to file a petition for certiorari in the Supreme Court have now expired and the matter is concluded.

***We have an accumulated deficit of \$854.2 million as of March 31, 2018, and we may continue to incur substantial operating losses for the future.***

We have generated a cumulative net loss of \$854.2 million for the period from our inception through March 31, 2018, and we anticipate losses in future years due to continued investment in our research and development programs. There can be no assurance that we will be able to achieve or maintain profitability or that we will be successful in the future.

***Our ability to utilize our net operating loss carryforwards and other tax attributes to offset future taxable income may be limited.***

As of December 31, 2017, we had approximately \$640.4 million and \$276.2 million of net operating loss, or NOL, carryforwards with which to offset our future taxable income for federal and state income tax reporting

purposes, respectively. Utilization of our net operating loss and tax credit carryforwards, or tax attributes, may be subject to substantial annual limitations provided by the Internal Revenue Code and similar state provisions to the extent certain ownership changes are deemed to occur. Such an annual limitation could result in the expiration of the tax attributes before utilization. The tax attributes reflected above have not been reduced by any limitations. To the extent it is determined upon completion of the analysis that such limitations do apply, we will adjust the tax attributes accordingly. We face the risk that our ability to use our tax attributes will be substantially restricted if we undergo an “ownership change” as defined in Section 382 of the U.S. Internal Revenue Code, or Section 382. An ownership change under Section 382 would occur if “5-percent shareholders,” within the meaning of Section 382, collectively increased their ownership in the Company by more than 50 percentage points over a rolling three-year period. We have not completed a recent study to assess whether any change of control has occurred or whether there have been multiple changes of control since the Company’s formation, due to the significant complexity and cost associated with the study. We have completed studies through December 31, 2016 and concluded no adjustments were required. If we have experienced a change of control at any time since our formation, our NOL carryforwards and tax credits may not be available, or their utilization could be subject to an annual limitation under Section 382. A full valuation allowance has been provided against our NOL carryforwards, and if an adjustment is required, this adjustment would be offset by an adjustment to the valuation allowance. Accordingly, there would be no impact on the consolidated balance sheet or statement of operations.

***We may have exposure to additional tax liabilities that could negatively impact our income tax provision, net income, and cash flow.***

We are subject to income taxes and other taxes in both the U.S. and the foreign jurisdictions in which we currently operate or have historically operated. The determination of our worldwide provision for income taxes and current and deferred tax assets and liabilities requires judgment and estimation. In the ordinary course of our business, there are many transactions and calculations where the ultimate tax determination is uncertain. We are subject to regular review and audit by U.S. tax authorities as well as subject to the prospective and retrospective effects of changing tax regulations and legislation. Although we believe our tax estimates are reasonable, the ultimate tax outcome may materially differ from the tax amounts recorded in our consolidated financial statements and may materially affect our income tax provision, net income, or cash flows in the period or periods for which such determination and settlement is made.

**Risks Relating to an Investment in our Common Stock**

***Our stock price has been and may continue to be volatile.***

The market price of our common stock has been volatile and is likely to continue to be so. The market price of our common stock may fluctuate due to factors including, but not limited to:

- our ability to meet the expectations of investors related to the commercialization of Qsymia and STENDRA;
- our ability to find the right partner for expanded Qsymia commercial promotion to a broader primary care physician audience;
- our ability to obtain marketing authorization for our products in foreign jurisdictions, including authorization from the EC for Qsiva in the EU;
- the costs, timing and outcome of post-approval clinical studies which FDA has required us to perform as part of the approval for Qsymia and STENDRA;
- the cost required to maintain the REMS program for Qsymia;
- results within the clinical trial programs for Qsymia and STENDRA or other results or decisions affecting the development of our investigational drug candidates;
- announcements of technological innovations or new products by us or our competitors;

- approval of, or announcements of, other anti-obesity compounds in development;
- publication of generic drug combination weight loss data by outside individuals or companies;
- actual or anticipated fluctuations in our financial results;
- our ability to obtain needed financing;
- sales by insiders or major stockholders;
- economic conditions in the U.S. and abroad;
- the volatility and liquidity of the financial markets;
- comments by or changes in assessments of us or financial estimates by security analysts;
- negative reports by the media or industry analysts on various aspects of our products, our performance and our future operations;
- the status of the CVOT and our related discussions with FDA;
- adverse regulatory actions or decisions;
- any loss of key management;
- deviations in our operating results from the estimates of securities analysts or other analyst comments;
- discussions about us or our stock price by the financial and scientific press and in online investor communities;
- investment activities employed by short sellers of our common stock;
- developments or disputes concerning patents or other proprietary rights;
- reports of prescription data by us or from independent third parties for our products;
- licensing, product, patent or securities litigation; and
- public concern as to the safety or efficacy of our drugs or future investigational drug candidates developed by us.

These factors and fluctuations, as well as political and other market conditions, may adversely affect the market price of our common stock. Additionally, volatility or a lack of positive performance in our stock price may adversely affect our ability to retain or recruit key employees, all of whom have been or will be granted equity awards as an important part of their compensation packages.

***Our operating results are unpredictable and may fluctuate. If our operating results are below the expectations of securities analysts or investors, the trading price of our stock could decline.***

Our operating results will likely fluctuate from fiscal quarter to fiscal quarter, and from year to year, and are difficult to predict. Product sales of Qsymia may never increase or become profitable. In addition, although we have entered into license and commercialization agreements with Menarini to commercialize and promote SPEDRA for the treatment of ED in over 40 countries, including the EU, plus Australia and New Zealand and with Metuchen to commercialize STENDRA in the U.S., Canada, South America and India, we and they may not be successful in commercializing avanafil in these territories. Our operating expenses are largely independent of sales in any particular period. We believe that our quarterly and annual results of operations may be negatively affected by a variety of factors. These factors include, but are not limited to, the level of patient demand for Qsymia and STENDRA, the ability of our distribution partners to process and ship product on a timely basis, the success of our third-party's manufacturing efforts to meet customer demand, fluctuations in foreign exchange rates, investments in sales and marketing efforts to support the sales of Qsymia and STENDRA, investments in the research and development efforts, and expenditures we may incur to acquire additional products.

***Future sales of our common stock may depress our stock price.***

Sales of our stock by our executive officers or directors, or the perception that such sales may occur, could adversely affect the market price of our stock. We have also registered all common stock that we may issue under our employee benefits plans. As a result, these shares can be freely sold in the public market upon issuance, subject to restrictions under the securities laws. Any of our executive officers or directors may adopt trading plans under SEC Rule 10b5-1 to dispose of a portion of their stock. If any of these events cause a large number of our shares to be sold in the public market, the sales could reduce the trading price of our common stock and impede our ability to raise future capital.

***Our charter documents and Delaware law could make an acquisition of our company difficult, even if an acquisition may benefit our stockholders.***

On November 8, 2016, our Board of Directors adopted an amendment and restatement of our Preferred Stock Rights Plan, which was originally adopted on March 26, 2007. As amended and restated, the Preferred Stock Rights Plan is designed to protect stockholder value by mitigating the likelihood of an “ownership change” that would result in significant limitations to our ability to use our NOLs or other tax attributes to offset future income. As amended and restated, the Preferred Stock Rights Plan will continue in effect until November 9, 2019, unless earlier terminated or the rights are earlier exchanged or redeemed by our Board of Directors. We submitted the plan to a vote at the 2017 annual meeting of stockholders, and stockholders ratified the plan at the 2017 annual meeting of stockholders. The Preferred Stock Rights Plan has the effect of causing substantial dilution to a person or group that acquires more than 4.9% of our shares without the approval of our Board of Directors. The existence of the Preferred Stock Rights Plan could limit the price that certain investors might be willing to pay in the future for shares of our common stock and could discourage, delay or prevent a merger or acquisition that a stockholder may consider favorable.

Some provisions of our Amended and Restated Certificate of Incorporation and Amended and Restated Bylaws could delay or prevent a change in control of our Company. Some of these provisions:

- authorize the issuance of preferred stock by the Board without prior stockholder approval, commonly referred to as “blank check” preferred stock, with rights senior to those of common stock;
- prohibit stockholder actions by written consent;
- specify procedures for director nominations by stockholders and submission of other proposals for consideration at stockholder meetings; and
- eliminate cumulative voting in the election of directors.

In addition, we are governed by the provisions of Section 203 of Delaware General Corporation Law. These provisions may prohibit large stockholders, in particular those owning 15% or more of our outstanding voting stock, from merging or combining with us. These and other provisions in our charter documents could reduce the price that investors might be willing to pay for shares of our common stock in the future and result in the market price being lower than it would be without these provisions.

## ITEM 2. UNREGISTERED SALES OF EQUITY SECURITIES AND USE OF PROCEEDS

### Issuer Purchases of Equity Securities

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share (or unit)	(c) Total number of shares (or units) purchased as part of publicly announced plans or programs	(d) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
January 2018	1,019	\$ 0.51	1,019	
February 2018	935	\$ 0.46	935	
March 2018	876	\$ 0.48	876	
Total	2,830	\$ 0.48	2,830	5,256

- (a) In the first quarter of 2018, restricted stock unit awards held by certain non-employee directors of the Company vested. These restricted stock units were settled by issuing to each non-employee director shares in the amount due to the director upon vesting, less the portion required to satisfy the estimated income tax liability based on the published stock price at the close of market on the settlement date or the next trading day, which the Company issued to the non-employee director in cash.

On February 23, 2018, the Company issued a warrant to purchase 1.5 million shares of the Company's common stock to Torrey Capital, LLC, with an exercise price of \$0.44 per share, a five-year term and a cashless exercise feature. 750,000 shares vested immediately and the remaining 750,000 shares will vest over a ten month period beginning February 28, 2018, subject to continued services being offered by Torrey Capital, LLC. The Company issued the warrant and will issue the underlying common stock pursuant to the exemption from registration provided by Section 4(a)(2) of the Securities Act of 1933, as amended.

## ITEM 3. DEFAULTS UPON SENIOR SECURITIES

None.

## ITEM 4. MINE SAFETY DISCLOSURES

Not applicable.

## ITEM 5. OTHER INFORMATION

None.

## ITEM 6. EXHIBITS

VIVUS, INC.

INDEX TO EXHIBITS

EXHIBIT NUMBER	DESCRIPTION
3.1 <sup>(1)</sup>	<a href="#">Amended and Restated Certificate of Incorporation of the Registrant.</a>
3.2 <sup>(2)</sup>	<a href="#">Amended and Restated Bylaws of the Registrant.</a>

- 3.3<sup>(3)</sup> [Amendment No. 1 to the Amended and Restated Bylaws of the Registrant.](#)
- 3.4<sup>(4)</sup> [Amendment No. 2 to the Amended and Restated Bylaws of the Registrant.](#)
- 3.5<sup>(5)</sup> [Amendment No. 3 to the Amended and Restated Bylaws of the Registrant.](#)
- 3.6<sup>(6)</sup> [Amendment No. 4 to the Amended and Restated Bylaws of the Registrant.](#)
- 3.7<sup>(7)</sup> [Amendment No. 5 to the Amended and Restated Bylaws of the Registrant.](#)
- 3.8<sup>(8)</sup> [Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock of the Registrant.](#)
- 4.1<sup>(9)</sup> [Specimen Common Stock Certificate of the Registrant.](#)
- 4.2<sup>(10)</sup> [Amended and Restated Preferred Stock Rights Agreement dated as of November 9, 2016, between the Registrant and Computershare Trust Company, N.A.](#)
- 4.3<sup>(11)</sup> [Indenture dated as of May 21, 2013, by and between the Registrant and Deutsche Bank Trust Company Americas, as trustee.](#)
- 4.4<sup>(12)</sup> [Form of 4.50% Convertible Senior Note due May 1, 2020.](#)
- 4.5\* [Warrant to Purchase Shares of Common Stock issued to Torreya Capital, LLC dated February 23, 2018.](#)
- 31.1\* [Certification of Chief Executive Officer pursuant to Rules 13a-14 and 15d-14 promulgated under the Securities Exchange Act of 1934, as amended.](#)
- 31.2\* [Certification of Chief Financial Officer pursuant to Rules 13a-14 and 15d-14 promulgated under the Securities Exchange Act of 1934, as amended.](#)
- 32\* [Certification of Chief Executive Officer and Chief Financial Officer pursuant to Section 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.](#)
- 101 The following materials from the Registrant's Quarterly Report on Form 10-Q for the quarter ended March 31, 2018, formatted in eXtensible Business Reporting Language (XBRL), include: (i) the Condensed Consolidated Balance Sheets, (ii) the Condensed Consolidated Statements of Operations, (iii) the Condensed Consolidated Statements of Comprehensive Loss, (iv) the Condensed Consolidated Statements of Cash Flows, and (v) related notes.

\* Filed herewith.

+ Furnished herewith.

- (1) Incorporated by reference to Exhibit 3.2 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 1996, filed with the SEC on March 28, 1997.
- (2) Incorporated by reference to Exhibit 3.2 filed with the Registrant's Current Report on Form 8-K filed with the SEC on April 20, 2012.
- (3) Incorporated by reference to Exhibit 3.3 filed with the Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2013, filed with the SEC on May 8, 2013.
- (4) Incorporated by reference to Exhibit 3.4 filed with the Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2013, filed with the SEC on May 8, 2013.
- (5) Incorporated by reference to Exhibit 3.1 filed with the Registrant's Current Report on Form 8-K filed with the SEC on May 13, 2013.

- (6) Incorporated by reference to Exhibit 3.1 filed with the Registrant's Current Report on Form 8-K filed with the SEC on July 24, 2013.
- (7) Incorporated by reference to Exhibit 3.1 filed with the Registrant's Current Report on Form 8-K filed with the SEC on September 18, 2015.
- (8) Incorporated by reference to Exhibit 3.3 filed with the Registrant's Registration Statement on Form 8-A filed with the SEC on March 28, 2007.
- (9) Incorporated by reference to Exhibit 4.1 filed with the Registrant's Annual Report on Form 10-K/A for the fiscal year ended December 31, 1996, filed with the SEC on April 16, 1997.
- (10) Incorporated by reference to Exhibit 4.1 filed with the Registrant's Current Report on Form 8-K filed with the SEC on November 9, 2016.
- (11) Incorporated by reference to Exhibit 4.1 filed with the Registrant's Current Report on Form 8-K filed with the SEC on May 21, 2013.
- (12) Incorporated by reference to Exhibit 4.2 filed with the Registrant's Current Report on Form 8-K filed with the SEC on May 21, 2013.

## SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

Date: May 8, 2018

VIVUS, Inc.

\_\_\_\_\_  
/s/ John Amos

John Amos  
Chief Executive Officer

\_\_\_\_\_  
/s/ Mark K. Oki

Mark K. Oki  
Chief Financial Officer and Chief Accounting Officer

THIS WARRANT AND THE SECURITIES ISSUABLE UPON THE EXERCISE HEREOF HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED, HYPOTHECATED, OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR AN OPINION OF COUNSEL SATISFACTORY TO THE COMPANY THAT REGISTRATION IS NOT REQUIRED UNDER SUCH ACT OR UNLESS SOLD PURSUANT TO RULE 144 UNDER SUCH ACT.

Date of Issuance:  
February 23, 2018

**VIVUS, INC.**  
**WARRANT TO PURCHASE SHARES OF COMMON STOCK**

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, this Warrant is issued to Torrey Capital, LLC (the "Holder") by VIVUS, Inc., a Delaware corporation (the "Company").

1. Purchase of Shares.

(a) Number of Shares. Subject to the terms and conditions set forth herein, the Holder is entitled, upon surrender of this Warrant at the principal office of the Company (or at such other place as the Company shall notify the Holder in writing) at any time and from time to time prior to the Expiration Date (as defined below), to purchase from the Company up to 1,500,000 fully paid and nonassessable shares of the Company's common stock, par value \$0.001 per share (the "Common Stock") at any time and from time to time, subject to the exercise provisions set forth in Section 2 below (such number of shares of Common Stock, as it may be adjusted from time to time pursuant to Section 7 below, the "Warrant Shares").

(b) Exercise Price. The exercise price for the shares of Common Stock issuable pursuant to this Section 1 (the "Shares") shall be \$0.44 per Share (the "Exercise Price"). The number of Shares and the Exercise Price shall be subject to adjustment pursuant to Section 7 hereof.

2. Exercisability, Exercise Period.

(a) Exercisability. The Warrant Shares shall vest and become exercisable pursuant to the following ten (10) month schedule commencing on January 29, 2018 (the "Warrant Vesting Commencement Date"): (i) 750,000 shares shall become immediately vested and exercisable, (ii) 75, 000 shares shall vest and become exercisable on the last day of each full calendar month following the Warrant Vesting Commencement Date, subject to Holder continuing to be engaged by the Company pursuant to the letter agreement, dated January 29, 2018, between the Holder and the Company (the "Letter Agreement") on the relevant vesting dates. The Holder may purchase, pursuant to the terms hereof, up to all of the vested Warrant Shares at any time and from time to time prior to the Expiration Date.

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(b) Exercise Period. Notwithstanding the foregoing, this Warrant shall no longer be exercisable and shall become null and void upon the earliest to occur of (i) the fifth (5<sup>th</sup>) anniversary of the date of this Warrant and (ii) the consummation of a Corporate Transaction. In the event of a Corporate Transaction, the Company shall notify the Holder in writing at least ten (10) days prior to the anticipated consummation of such Corporate Transaction (such notice, the “Transaction Notice”). The Company must provide to the Holder all material information in the Transaction Notice about the Corporate Transaction, including, but not limited to, contemplated terms and any valuation work presented to the Company’s Board of Directors. The date of the expiration of this Warrant pursuant to this Section 2(b) is referred to herein as the “Expiration Date”.

(c) A “Corporate Transaction” shall mean any of: (A) the closing of the sale, transfer or other disposition of all or substantially all of the Company’s assets, (B) the consummation of the merger or consolidation of the Company with or into another entity (except a merger or consolidation in which the holders of capital stock of the Company immediately prior to such merger or consolidation continue to hold at least fifty percent (50%) of the voting power of the capital stock of the Company or the surviving or acquiring entity), (C) the closing of the transfer (whether by merger, consolidation or otherwise), in one transaction or a series of related transactions, to a person or group of affiliated persons (other than an underwriter of the Company’s securities), of the Company’s securities if, after such closing, such person or group of affiliated persons would hold fifty percent (50%) or more of the outstanding voting stock of the Company (or the surviving or acquiring entity), (D) a liquidation, dissolution or winding up of the Company; provided, however, that a transaction shall not constitute a Liquidation Event if its sole purpose is to change the state of the Company’s incorporation or to create a holding company that will be owned in substantially the same proportions by the persons who held the Company’s securities immediately prior to such transaction or (E) the exclusive license of all or substantially all of the Company’s intellectual property.

### 3. Method of Exercise.

(a) At any time and from time to time while this Warrant remains outstanding and exercisable in accordance with Section 2 above, the Holder may exercise, in whole or in part, the purchase rights evidenced hereby with respect to any Warrant Shares. Such exercise shall be effected by:

(i) the surrender of the Warrant, together with a duly executed copy of the Notice of Exercise attached hereto as Exhibit A, to the Secretary of the Company at its principal office (or at such other place as the Company shall notify the Holder in writing); and

(ii) the payment to the Company of an amount equal to the aggregate Exercise Price for the number of Warrant Shares being purchased, which amount shall be payable (at the Holder’s discretion) by (A) a check payable to the Company’s order, (B) wire transfer of funds to the Company, (C) cancellation of indebtedness of the Company to the Holder, (D) net exercise as provided in Section 4 hereof, or (E) any combination of the foregoing.

(b) Each exercise of this Warrant shall be deemed to have been effected immediately prior to the close of business on the day on which this Warrant is surrendered to the Company as provided in Section 3(a) above; provided, that, upon the exercise of this Warrant in connection with a Corporate Transaction, the exercise and payment may be contingent upon (and be deemed to occur as of immediately prior to) the consummation of such Corporate Transaction. At such time, the person or persons in whose name or names any certificate for Warrant Shares shall be issuable upon such exercise as provided in Section 3(c) below shall be deemed to have become the holder or holders of record of the Warrant Shares

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represented by such certificate and such Warrant Shares shall be held by Holder until the expiration of the Lock-Up Period set forth in Section 19.

(c) As soon as practicable after the exercise of Warrant Shares in whole or in part, the Company at its expense will cause to be issued in the name of, and delivered to, the Holder, or as such Holder (upon payment by such Holder of any applicable transfer taxes) may direct:

(i) a certificate or certificates for the number of Warrant Shares to which such Holder shall be entitled, and

(ii) in case such exercise is in part only, a new warrant or warrants (dated the date hereof) having the same terms and conditions as this Warrant, except that the number of Warrant Shares shall be reduced to reflect such partial exercise.

4. Net Exercise. In lieu of exercising this Warrant for cash, the Holder may elect to receive shares equal to the value of this Warrant (or the portion thereof being exercised) by surrender of this Warrant at the principal office of the Company together with notice of such election (a "Net Exercise"). A Holder who Net Exercises shall have the rights described in Sections 3(b) and 3(c) hereof, and the Company shall issue to such Holder a number of Warrant Shares computed using the following formula:

Where

X = The number of Warrant Shares to be issued to the Holder pursuant to the applicable net exercise of this Warrant effected pursuant to this Section 4.

Y = The number of Warrant Shares purchasable under this Warrant at the time of such net exercise (as such number may have been adjusted pursuant to Section 7 prior to the time of such net exercise) or, if only a portion of the Warrant Shares are being purchased pursuant to such net exercise, such portion of the Warrant Shares.

A = The fair market value of one (1) Share on the date of such calculation.

B = The Exercise Price (as it may have been adjusted pursuant to Section 7 prior to the time such exercise is deemed to have occurred).

For purposes of this Section 4: (a) if the net exercise is not occurring in connection with a Corporate Transaction and the Shares are traded at the time of applicable net exercise on the over-the-counter market, an exchange or an electronic securities market, the fair market value of a Share shall mean the average of the closing prices of the Shares quoted in the over-the-counter market in which the Shares are traded or the closing price quoted on any exchange or electronic securities market on which the Shares are listed, whichever is applicable, as published in *The Wall Street Journal* for the thirty (30) trading days prior to the date of determination of fair market value (or such shorter period of time during which such Shares were traded over-the-counter or on such exchange or market); (b) if such net exercise is occurring in connection with a Corporate Transaction, then the fair market value per Share shall be the per share price being offered or provided to holders of Shares in such Corporate Transaction; and (c) if such net exercise is not occurring in connection with a Corporate Transaction and the Shares are not traded on the

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over-the-counter market, an exchange or an electronic securities market, the fair market value shall be the price per Share that the Company could obtain from a willing buyer for Shares sold by the Company from authorized but unissued Shares, as such prices shall be determined reasonably and in good faith by the Company's Board of Directors; *provided, however*, that, in the case of this clause "(c)," the Holder may dispute such valuation, in which event the fair market value of a Share shall be determined by an accounting firm of nationally recognized reputation to be mutually agreed upon by the Holder and the Company (it being understood that the Holder and the Company shall use their best efforts to agree upon such accounting firm, and, if such agreement is not reached within thirty (30) days, shall cause such an accounting firm to be appointed by the order of a court of competent jurisdiction or arbitrator).

5. Representations and Warranties of the Company. In connection with the transactions provided for herein, the Company hereby represents and warrants to the Holder that:

(a) Organization, Good Standing, and Qualification. The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware and has all requisite corporate power and authority to carry on its business as now conducted. The Company is duly qualified to transact business and is in good standing in each jurisdiction in which the failure to so qualify would have a material adverse effect on its business or properties.

(b) Authorization. All corporate action has been taken on the part of the Company, its officers, directors, and stockholders necessary for the authorization, execution and delivery of this Warrant. This Warrant constitutes the Company's valid and legally binding obligation, enforceable in accordance with its terms, except as may be limited by (i) applicable bankruptcy, insolvency, reorganization, or similar laws relating to or affecting the enforcement of creditors' rights and (ii) laws relating to the availability of specific performance, injunctive relief or other equitable remedies. The issuance of this Warrant will not be subject to preemptive rights of any stockholders of the Company. The Company has authorized sufficient shares of Common Stock to allow for the exercise of this Warrant.

(c) Common Stock. The Shares, when issued, sold, and delivered in accordance with the terms of the Warrant for the consideration expressed herein, will be duly and validly issued, fully paid and nonassessable and, based in part upon the representations and warranties of the Holders in this Warrant, will be issued in compliance with all applicable federal and state securities laws.

6. Representations and Warranties of the Holder. In connection with the transactions provided for herein, the Holder hereby represents and warrants to the Company that:

(a) Authorization. Holder represents that it has full power and authority to enter into this Warrant. This Warrant constitutes the Holder's valid and legally binding obligation, enforceable in accordance with its terms, except as may be limited by (i) applicable bankruptcy, insolvency, reorganization, or similar laws relating to or affecting the enforcement of creditors' rights and (ii) laws relating to the availability of specific performance, injunctive relief or other equitable remedies.

(b) Purchase Entirely for Own Account. The Holder acknowledges that this Warrant is entered into by the Holder in reliance upon such Holder's representation to the Company that the Warrant and the Shares (collectively, the "Securities") will be acquired for investment for the Holder's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof, and that the Holder has no present intention of selling, granting any participation in or otherwise distributing the same. By acknowledging this Warrant, the Holder further represents that the Holder does not have any contract, undertaking, agreement, or arrangement with any person to sell, transfer or grant participations to such person or to any third person, with respect to the Securities.

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(c) Disclosure of Information. The Holder acknowledges that it has received all the information it considers necessary or appropriate for deciding whether to acquire the Securities. The Holder further represents that it has had an opportunity to ask questions and receive answers from the Company regarding the terms and conditions of the offering of the Securities.

(d) Investment Experience. The Holder is an investor in securities and acknowledges that it is able to fend for itself, can bear the economic risk of its investment, and has such knowledge and experience in financial or business matters that it is capable of evaluating the merits and risks of the investment in the Securities. If other than an individual, the Holder also represents it has not been organized solely for the purpose of acquiring the Securities.

(e) Accredited Investor. The Holder is an “accredited investor” within the meaning of Rule 501 of Regulation D, as presently in effect, as promulgated by the Securities and Exchange Commission (the “SEC”) under the Act.

(f) Restricted Securities. The Holder understands that the Securities are characterized as “restricted securities” under the federal securities laws inasmuch as they are being acquired from the Company in a transaction not involving a public offering and that under such laws and applicable regulations such securities may be resold without registration under the Act, only in certain limited circumstances. In this connection, the Holder represents that it is familiar with Rule 144, as presently in effect, as promulgated by the SEC under the Act (“Rule 144”), and understands the resale limitations imposed thereby and by the Act.

(g) Legends. It is understood that the Securities may bear the following legend:

“THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED. THEY MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED, HYPOTHECATED, OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR AN OPINION OF COUNSEL SATISFACTORY TO THE COMPANY THAT REGISTRATION IS NOT REQUIRED UNDER SUCH ACT OR UNLESS SOLD PURSUANT TO RULE 144 UNDER SUCH ACT.”

“THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO A LOCK-UP PERIOD AS SET FORTH IN A WARRANT BETWEEN THE COMPANY AND THE ORIGINAL HOLDER OF THESE SECURITIES.”

7. Adjustment of Exercise Price and Number of Shares. The number and kind of Shares purchasable upon exercise of this Warrant and the Exercise Price therefor shall be subject to adjustment from time to time as follows. Any adjustment made pursuant to this Section 7 shall become effective immediately after the effective date of such event, but shall be retroactive to the record date, if any is fixed, for such event.

(a) Subdivisions, Combinations and Other Issuances. If the Company shall at any time after the issuance but prior to the Expiration Date subdivide its Common Stock, by split-up, reverse split-up or otherwise, or combine its Common Stock, or issue additional shares of its preferred stock or Common Stock as a dividend with respect to any shares of its Common Stock, the number of Shares issuable on the exercise of this Warrant shall forthwith be proportionately increased in the case of such

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subdivision or stock dividend, or proportionately decreased in the case of a combination. Appropriate adjustments shall also be made to the Exercise Price payable per share, but the aggregate Exercise Price payable for the total number of Shares purchasable under this Warrant (as adjusted) shall remain the same. Any adjustment under this Section 7(a) shall become effective at the close of business on the date the subdivision or combination becomes effective, or as of the record date of such dividend, or in the event that no record date is fixed, upon the making of such dividend.

(b) Reclassification, Reorganization and Consolidation. In case of any reclassification, capital reorganization or change affecting the Common Stock of the Company (other than as a result of a subdivision, combination or stock dividend provided for in Section 7(a) above), then, as a condition of such reclassification, reorganization or change, lawful provision shall be made, and duly executed documents evidencing the same from the Company or its successor shall be delivered to the Holder, so that the Holder shall have the right at any time prior to the Expiration Date to purchase, at a total price equal to that payable upon the exercise of this Warrant, the kind and amount of shares of stock and other securities or property receivable by holders of Common Stock in their capacities as such in connection with such reclassification, reorganization or change. In any such case, appropriate provisions shall be made with respect to the rights and interest of the Holder so that the provisions hereof shall thereafter be applicable with respect to any shares of stock or other securities or property deliverable upon exercise hereof, and appropriate adjustments shall be made to the Exercise Price per Share payable hereunder, but the aggregate Exercise Price payable for the total number of Shares purchasable under this Warrant (as adjusted) shall remain the same.

(c) Notice of Adjustment. When any adjustment is required to be made in the number or kind of shares purchasable upon exercise of the Warrant, or in the Exercise Price, the Company shall promptly, notify the Holder of such event and of the number of Shares or other securities or property thereafter purchasable upon exercise of this Warrant.

8. No Fractional Shares or Scrip. No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Warrant, but in lieu of such fractional shares the Company shall make a cash payment therefor to the Holder on the basis of the Exercise Price then in effect.

9. No Stockholder Rights or Liabilities. Prior to exercise of this Warrant, the Holder shall not be entitled to any rights of a stockholder with respect to the Shares, including (without limitation) the right to vote such Shares or receive dividends or other distributions thereon.

10. Transfer of Warrant. Following the expiration of the Lock-Up Period set forth in Section 19, subject to compliance with applicable federal and state securities laws and any other contractual restrictions between the Company and the Holder contained herein, this Warrant and all rights hereunder are transferable in whole or in part by the Holder to any person or entity upon written notice to the Company. This Agreement will be binding upon, and inure to the benefit of, the successors and permitted assigns of the parties. Within a reasonable time after the Company's countersigning of an executed Assignment Form in the form attached hereto as Exhibit B, the transfer shall be recorded on the books of the Company upon the surrender of this Warrant, properly endorsed, to the Company at its principal offices, and the payment to the Company of all transfer taxes and other governmental charges imposed on such transfer. In the event of a partial transfer, the Company shall issue to the new holders one (1) or more appropriate new warrants.

11. Governing Law. This Warrant shall be governed by, and construed under, the laws of the State of Delaware, as such laws are applied to agreements among Delaware residents, made and to be performed entirely within the State of Delaware.

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12. Successors and Assigns. The terms and provisions of this Warrant shall inure to the benefit of, and be binding upon, the Company and the holders hereof and their respective successors and assigns.

13. Titles and Subtitles. The titles and subtitles used in this Warrant are used for convenience only and are not to be considered in construing or interpreting this Warrant.

14. Notices. All notices and other communications given or made pursuant hereto shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient, and if not so confirmed, then on the next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be sent to the respective parties at the addresses shown on the signature page(s) attached hereto (or at such other addresses as shall be specified by notice given in accordance with this Section 14).

15. Finder's Fee. Each party represents that it neither is nor will be obligated for any finder's fee or commission in connection with this transaction. The Holder agrees to indemnify and to hold harmless the Company from any liability for any commission or compensation in the nature of a finder's fee (and the costs and expenses of defending against such liability or asserted liability) for which the Holder or any of its officers, members, employees or representatives is responsible. The Company agrees to indemnify and hold harmless the Holder from any liability for any commission or compensation in the nature of a finder's fee (and the costs and expenses of defending against such liability or asserted liability) for which the Company or any of its officers, employees or representatives is responsible.

16. Expenses. If any action at law or in equity is necessary to enforce or interpret the terms of this Warrant, the prevailing party shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

17. Entire Agreement; Amendments and Waivers. This Warrant and any other documents delivered pursuant hereto constitute the full and entire understanding and agreement between the parties with regard to the subjects hereof and thereof. Nonetheless, any term of this Warrant may be amended and the observance of any term of this Warrant may be waived (either generally or in a particular instance and either retroactively or prospectively), with the written consent of the Company and the Holder; or if this Warrant has been assigned in part, by the holders of rights to purchase a majority of the shares originally issuable pursuant to this Warrant.

18. Severability. If any provision of this Warrant is held to be unenforceable under applicable law, such provision shall be excluded from this Warrant and the balance of the Warrant shall be interpreted as if such provision were so excluded and shall be enforceable in accordance with its terms.

19. Lock-Up Agreement. Until the earlier of (x) twelve (12) months following the exercise of this Warrant in full and (y) six (6) months following the termination of Holder's engagement as set forth under the heading "Right to Terminate" in the Letter Agreement (the "Lock-up Period"), the Holder agrees to not, and to cause its Affiliates to not, lend, offer, pledge (other than customary pledging in connection with a prime brokerage or other brokerage-related agreement), sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right, or warrant to purchase, or otherwise transfer or dispose of, directly or indirectly, any Shares or (ii) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences

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of ownership of such Shares, whether any such transaction described in clause (i) or (ii) above is to be settled by delivery of Shares or other securities, in cash, or otherwise.

“Affiliate” means any other party directly or indirectly Controlling, Controlled by, or Under Common Control with, such Person. “Control” (including, with correlative meanings, the terms “Controlling,” “Controlled by” and “Under Common Control with”) means, as applied to any party, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such party, whether through the ownership of voting securities or other equity interests, by contract, through membership or otherwise.

In order to enforce the foregoing covenant, the Company may impose stop-transfer instructions with respect to Shares acquired through the exercise of this Warrant (and the Shares or securities of every other person subject to the foregoing restriction) until the end of such period.

20. Counterparts. This Warrant may be executed in counterparts (which may be PDF scans of the applicable signatures), each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

*(Remainder of page intentionally left blank)*

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IN WITNESS WHEREOF, the parties have executed this Warrant as of the date first written above.

VIVUS, INC.

By

/s/ Mark K. Oki

Mark K. Oki, Chief Financial Officer

ACKNOWLEDGED AND AGREED:

TORREYA CAPITAL, LLC

By \_\_\_\_\_

Name:

Title:

Address:

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**EXHIBIT A**

**NOTICE OF EXERCISE**

**VIVUS, INC.**

Attention: Corporate Secretary

The undersigned hereby elects to purchase, pursuant to the provisions of the Warrant, as follows:

☐ \_\_\_\_\_ shares of Common Stock pursuant to the terms of the attached Warrant, and tenders herewith payment in cash of the Exercise Price of such Shares in full, together with all applicable transfer taxes, if any.

☐ Net Exercise the attached Warrant with respect to \_\_\_\_\_ Warrant Shares.

The undersigned hereby represents and warrants that the Representations and Warranties in Section 6 of the Warrant are true and correct as of the date hereof.

**HOLDER:**

Date \_\_\_\_\_

By \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Name in which shares should be registered:

\_\_\_\_\_

\_\_\_\_\_

**EXHIBIT B**

**ASSIGNMENT FORM**

(To assign the foregoing Warrant, execute this form and supply required information. Do not use this form to purchase shares.)

**For Value Received**, the foregoing Warrant and all rights evidenced thereby are hereby assigned to

Name: \_\_\_\_\_  
(Please Print)

Address: \_\_\_\_\_  
(Please Print)

Dated: \_\_\_\_\_

Holder's  
Signature: \_\_\_\_\_

Holder's  
Address: \_\_\_\_\_

Acknowledged and Agreed (if required):

VIVUS, INC.

By \_\_\_\_\_  
Name:  
Title:

**NOTE:** The signature to this Assignment Form must correspond with the name as it appears on the face of the Warrant. Officers of corporations and those acting in a fiduciary or other representative capacity should provide proper evidence of authority to assign the foregoing Warrant.

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## CERTIFICATION

I, John Amos, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VIVUS, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: May 8, 2018

By: /s/ John Amos  
John Amos  
Chief Executive Officer

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## CERTIFICATION

I, Mark K. Oki, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VIVUS, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: May 8, 2018

By: /s/ Mark K. Oki

Mark K. Oki

Chief Financial Officer and Chief Accounting Officer

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**CERTIFICATION OF CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER  
PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, John Amos, Chief Executive Officer of VIVUS, Inc., certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of VIVUS, Inc. on Form 10-Q for the period ended March 31, 2018, fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of VIVUS, Inc. This written statement is being furnished to the Securities and Exchange Commission as an exhibit to such Quarterly Report on Form 10-Q. A signed original of this statement has been provided to VIVUS, Inc. and will be retained by VIVUS, Inc. and furnished to the Securities and Exchange Commission or its staff upon request.

Date: May 8, 2018

By: /s/ John Amos  
John Amos  
Chief Executive Officer

I, Mark K. Oki, Chief Financial Officer and Chief Accounting Officer of VIVUS, Inc., certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of VIVUS, Inc. on Form 10-Q for the period ended March 31, 2018, fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of VIVUS, Inc. This written statement is being furnished to the Securities and Exchange Commission as an exhibit to such Quarterly Report on Form 10-Q. A signed original of this statement has been provided to VIVUS, Inc. and will be retained by VIVUS, Inc. and furnished to the Securities and Exchange Commission or its staff upon request.

Date: May 8, 2018

By: /s/ Mark K. Oki  
Mark K. Oki  
Chief Financial Officer and Chief Accounting Officer

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