

# VIVUS, INC.

## CORPORATE GOVERNANCE GUIDELINES

### A. INTRODUCTION

The following Corporate Governance Guidelines (the “**Guidelines**”) have been adopted as guidelines and principles for the conduct of the Board of Directors (the “**Board**”) of VIVUS, Inc. (the “**Company**”). They reflect the Board’s commitment to monitoring the effectiveness of decision-making at the Board and management level and ensuring adherence to good corporate governance principles, all with a goal of enhancing stockholder value over the long term. The Guidelines are subject to periodic review by the Nominating and Governance Committee of the Board (the “**Nominating Committee**”).

The Guidelines should be interpreted in the context of all applicable laws and regulations and the Company’s certificate of incorporation (as may be amended or restated from time to time, the “**Certificate of Incorporation**”) and bylaws (as may be amended or restated from time to time, the “**Bylaws**”). The Guidelines are statements of policy and are not intended to supersede or interpret any Federal or state law, rule or regulation, including the Delaware General Corporation Law, or the Company’s Certificate of Incorporation or Bylaws.

### B. THE BOARD OF DIRECTORS

#### 1. *Size*

The number of directors constituting the Board should be consistent with the Company’s Bylaws or resolution of the Board. The Nominating Committee will periodically review the size of the Board and may recommend adjustments from time to time.

#### 2. *Composition of the Board of Directors – Independence*

The Company defines an “independent” director in accordance with the applicable provisions of the Securities Exchange Act of 1934, as amended, together with the rules promulgated thereunder (the “**Exchange Act**”) and the applicable rules of The NASDAQ Stock Market, LLC (“**NASDAQ**”). Because it is not possible to anticipate or explicitly provide for all potential situations that may affect independence, the Board periodically reviews each director’s status as an independent director and whether any independent director has any other relationship with the Company that, in the judgment of the Board, would interfere with the director’s exercise of independent judgment in carrying out such director’s responsibilities as a director. The Board will make an annual determination as to whether each director is “independent” under the applicable provisions of the Exchange Act and the applicable rules of NASDAQ. The following guidelines will apply to independence:

- (a) Per Se Exclusions. A director will not be deemed independent if: (i) the director was employed by the Company or a subsidiary of the Company within the previous three years; (ii) a family member of the director was employed by the Company or a subsidiary of the Company as an executive officer within the previous three years; (iii) the director or any of his or her family members

accepted any compensation (including political contributions and payments pursuant to consulting or personal service contracts) from the Company or any subsidiary of the Company of more than \$120,000 during any period of twelve consecutive months within three years preceding the Company's determination of independence (other than (A) payments for service as a member of the Board or a committee of the Board, (B) compensation paid to a family member who is a non-executive employee of the Company or a subsidiary of the Company, or (C) benefits under a tax-qualified retirement plan, or non-discretionary compensation); (iv) the director or a family member of the director is a partner in, or an executive officer or controlling stockholder of, any for-profit or not-for-profit organization to which the Company made or from which the Company received, payments in the current fiscal year or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year or \$200,000, whichever is more (other than (A) payments arising solely from investments in the Company's securities or (B) payments under non-discretionary charitable contribution matching programs); (v) the director or a family member of the director is or was employed as an executive officer of another entity that has or had within the past three years as a member of its compensation committee of the board of directors any of the Company's executive officers; and (vi) the director or a family member of the director is a partner of the Company's independent auditors, or was a partner or employee of the Company's independent auditors and worked on the Company's audit during any of the past three years. For the purpose of these Guidelines, "family member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

- (b) Board Determinations. In connection with relationships other than those listed in subsection (i) above that preclude a determination of independence, the determination of whether the relationship would interfere with the director's independent judgment in carrying out his or her responsibilities shall be made by the Board, subject to applicable listing standards or legal requirements.
- (c) Additional Audit Committee Membership Requirements. Audit Committee members may not accept, directly or indirectly, any consulting, advisory or other compensatory fee from the Company or any Company subsidiary. For the purpose of this paragraph, compensatory fees do not include fees for service on the Board or a Board committee, or the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the Company (provided that such compensation is not contingent in any way on continued service). In addition, Audit Committee members may not be "affiliated persons" of the Company or any Company subsidiary, as defined in Rule 10A-3 under the Exchange Act. Moreover, Audit Committee members may not have participated in the preparation of the financial statements of the Company or any subsidiary of the Company (other than entities that have ceased to be subsidiaries of the Company) at any time during the preceding three years.

### ***3. Board Leadership Structure and Selection of Chairman and CEO***

The Board elects its Chairman and appoints the Company's Chief Executive Officer according to its view of what is best for the Company at any given time. The Company maintains separate positions of Chairman and Chief Executive Officer. Having these positions separate allows the Chief Executive Officer to focus on the daily operations, while allowing the Chairman to lead the Board in its fundamental role of providing advice to and independent oversight of management. While the Company's charter documents do not require that our Chairman and Chief Executive Officer positions be separate, the Board believes that having separate positions is the appropriate leadership structure to assure good and efficient corporate governance. The Board has charged the Chairman with responsibility for presiding over meetings of the Board, developing meeting agendas in consultation with management, facilitating communication between management and the Board, representing director views to management and improving meeting effectiveness, among other things. The Chairman is elected annually.

### ***4. Board Membership Criteria***

In accordance with its Charter, the Nominating Committee is responsible for considering and periodically reporting on matters related to the identification, selection and qualification of the Board and candidates nominated to the Board and its committees; developing and recommending governance principles applicable to the Company; and overseeing the evaluation of the Board and management. The Board as a whole should collectively possess a broad range of skills, expertise, industry and other knowledge, and business and other experience useful to the effective oversight of the Company's business.

### ***5. Attendance at Board and Committee Meetings***

Directors must be willing to devote sufficient time to carrying out their duties and responsibilities effectively. Board members are expected to prepare for, attend, and participate in meetings of the Board and the committees of which they are members. Although the Board recognizes that, on occasion, circumstances may prevent Board members from attending meetings, the Board expects its members to schedule their other commitments so as not to materially interfere with the performance of their duties.

### ***6. Selection of Board Members; Vacancies***

The Board is responsible for filling vacancies in its membership, replacing directors who are unable to continue to serve effectively, and nominating candidates to stand for election at the annual meeting of stockholders. The Board has delegated to the Nominating Committee the process of identifying and screening candidates when a vacancy is to be filled and making preliminary recommendations to the Board for nominations. In accordance with the Company's Bylaws, directors elected by the Board to fill a vacancy or newly created directorship shall hold office for a term expiring at the next annual meeting of stockholders.

### ***7. Occupations and Memberships on Other Boards***

Directors should not serve on boards of public companies in addition to the Company's Board where such service is likely to interfere with the performance of the director's duties to the Company, taking into account the individual, the nature of his or her other activities and such

other factors or considerations as the Board deems relevant. In selecting nominees for membership, the Board shall take into account the other demands on the time of a candidate.

#### ***8. Term Limits***

The Board does not believe it should establish term limits. While term limits could help insure that there are fresh ideas and viewpoints available to the Board, they may sometimes force the Company to lose the contribution of directors who over time have developed increased insight into the Company and its operations. The Board seeks, therefore, to maintain a balance of directors who have longer terms of service and directors who have joined more recently.

#### ***9. Board and Officer Compensation***

The Compensation Committee shall review the compensation and benefits paid to non-employee directors at least once a year and recommend any appropriate changes to the Board for its approval. The Compensation Committee is also responsible for reviewing and approving the compensation and benefits for officers, and all bonuses, equity incentive awards or other compensation, and performing other duties regarding compensation for employees and consultants as the Board may delegate from time to time. Directors who are officers or employees shall not receive any additional compensation for serving on the Board. To assist in setting compensation, the Compensation Committee or the full Board may request information from employees of the Company or from independent consultants on the compensation of boards of comparable companies.

#### ***10. Voting for Directors.***

Directors are elected in accordance with the Company's Certificate of Incorporation and Bylaws. As provided in the Company's Bylaws, in any election of directors, each director will be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. The Company's policy regarding election of directors will be summarized in each proxy statement relating to an election of directors.

#### ***11. Attendance at Annual Meeting.***

All Board members are encouraged, but not required, to attend our Annual Meeting of Stockholders.

#### ***12. Annual Performance Evaluation.***

The Board will conduct an annual review and self-evaluation to determine whether it and its committees are functioning effectively. The review will focus on the Board's contribution to the Company and will seek to identify specific areas, if any, that need improvement or strengthening. Such review shall include presentations to the Board by each committee chairman, and may, if deemed necessary or appropriate by the Board, include reviews and/or presentations by the Company's independent advisors, including its legal counsel and independent auditing firm. The Nominating Committee shall be responsible for overseeing the Board and committee evaluation process and reporting its assessments to the Board.

The Board also will conduct an annual review to ensure that the Company is in compliance with all applicable NASDAQ listing requirements and to ensure that all required certifications and public disclosures are made.

## **C. BOARD MEETINGS**

### ***1. Board Chairmanship; Selection of Agenda Items for Board Meetings***

The Chairman, and in the absence of the Chairman, the senior independent director present shall preside at the meetings of stockholders and the Board.

The Chairman, in consultation with appropriate members of management, and the Board committee chairs, will develop the agenda for each Board meeting and circulate to the Board members in advance of each meeting. Although materials relevant to the agenda are generally circulated to the Board in advance, exceptions are sometimes made for materials related to particularly sensitive topics. Each Board member is free and encouraged to suggest the inclusion of items on the agenda.

### ***2. Board Presentations; Access to Employees and Independent Advisors***

The Board has full access to any Company employee. The Company does not prohibit its employees from contacting Board members directly to express concerns about the direction or management of the Company. Board members may, at the expense of the Company, consult with independent legal, financial and accounting advisors to assist them in the performance of their duties to the Company and its stockholders.

The Board encourages presentations at its meetings by employees who can provide additional insight into the topics because of their direct involvement in the area, or have leadership potential of which the Board should be aware.

### ***3. Executive Sessions of Independent Directors***

The independent directors will meet in executive session without management and any non-independent directors at least quarterly. An independent director selected by a majority of the Board, will preside over and develop the agenda for the executive sessions of independent directors. An independent director selected by a majority of the Board, may call meetings of the independent directors of the Board. Each Board member is free and encouraged to suggest the inclusion of items to be discussed in the executive sessions of independent directors.

## **D. BOARD COMMITTEES**

### ***1. Standing and Special Committees***

The Board currently has standing committees on (i) Audit, (ii) Compensation, and (iii) Nominating and Governance. Each of these committees operates under a written charter outlining its duties and responsibilities. The Board may form new standing committees when it believes the work of the Board requires it. The Board also appoints special committees from time to time to assist it in carrying out particular responsibilities.

## ***2. Assignment and Term of Service of Committee Members***

The Board, with the advice of the Nominating Committee, appoints the members and the chair of each of its standing committees. There are no fixed terms for service on standing committees. The Board may replace committee members when it believes that to be appropriate.

## ***3. Frequency and Length of Committee Meetings and Committee Agenda***

Each standing committee shall fix its own rules of procedure, which shall be consistent with the Bylaws of the Company. Pursuant to their own rules of procedure, the committees shall, with the assistance of appropriate members of management, determine the frequency and length of meetings of the committee and develops the agenda for each meeting. At the direction of the chair, a member of the committee or a member of management takes minutes of each committee meeting. Board members who are not members of a committee are nevertheless welcome to attend its meetings.

## **E. OVERSIGHT OF RISK**

The Board believes that risk management is an important part of establishing, updating and executing on the Company's business strategy. The Board, as a whole and at the committee level, has oversight responsibility relating to risks that could affect the corporate strategy, business objectives, compliance, operations, and the financial condition and performance of the Company. The Board focuses its oversight on the most significant risks facing the Company and on its processes to identify, prioritize, assess, manage and mitigate those risks. The Board and its committees receive regular reports from members of the Company's senior management on areas of material risk to the Company, including strategic, operational, financial, legal and regulatory risks. While the Board has an oversight role, management is principally tasked with direct responsibility for management and assessment of risks and the implementation of processes and controls to mitigate their effects on the Company.

The Audit Committee as part of its responsibilities oversees the management of financial risks, including but not limited to accounting matters, liquidity and credit risks, corporate tax positions, insurance coverage, and cash investment strategy and results. The Audit Committee is also responsible for overseeing the management of risks relating to the performance of the Company's internal audit function and its independent registered public accounting firm, as well as the Company's systems of internal controls and disclosure controls and procedures. The Compensation Committee is responsible for overseeing the management of risks relating to the Company's executive compensation and overall compensation and benefit strategies, plans, arrangements, practices and policies. The Nominating Committee oversees the management of risks associated with Company's overall compliance and corporate governance practices, and the independence, composition and compensation of the Board. These committees provide regular reports to the full Board.

## **F. MANAGEMENT REVIEW AND RESPONSIBILITY**

### ***1. Evaluation and Compensation of Officers***

The Compensation Committee annually evaluates the performance of, and approves the compensation package for, the Chief Executive Officer. It also reviews the Chief Executive

Officer's evaluations of the performance of, and the Chief Executive Officer's recommendations for determination of the compensation packages for, the officers of the Company who report directly to the Chief Executive Officer and any executive officers whose compensation is required to be disclosed in detail in the Company's regular annual proxy statement.

## ***2. Succession Planning***

The Board plans for the succession to the position of the Chief Executive Officer. The Nominating Committee, with the assistance of the Chief Executive Officer, periodically reviews and assesses the Company's succession plans for the Chief Executive Officer and other officers and senior executives of the Company, and makes recommendations to the Board and management as necessary.

## ***3. Board Interaction with Institutional Investors, Press, Customers, Etc.***

The Board believes that management should speak for the Company. Individual Board members may, from time to time, meet or otherwise communicate with various constituencies that are involved with the Company, but it is expected that outside Board members would do this with the knowledge, and in most instances at the request, of management.

## **G. TRANSACTIONS WITH DIRECTORS**

It is the policy of the Board that any transaction in which a director (or any member of a director's immediate family) has a personal or financial interest (direct or indirect) should be scrutinized in accordance with the Company's Code of Business Conduct and Ethics. It is incumbent upon each director to promptly notify the Audit Committee when he or she becomes aware of a matter in which he or she (or any member of a director's immediate family) has, or may have, a personal or financial interest (whether direct or indirect) or may otherwise have a potential conflict of interest.

## **H. REVIEW AND MODIFICATION OF THESE PRINCIPLES**

The Guidelines, as set forth herein, will be reviewed by the Nominating Committee from time to time. If the Nominating Committee determines that modifications are in order, it will make recommendations of changes for the Board to consider.

**Approved: February 20, 2013**

**Effective: February 20, 2013**