

ACTUATE CORP
Form SC TO-I
November 05, 2008

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**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
SCHEDULE TO
TENDER OFFER STATEMENT
under Section 14(d)(1) or Section 13(e)(1) of the Securities Exchange Act of 1934**

**ACTUATE CORPORATION
(Name Of Subject Company (Issuer))
ACTUATE CORPORATION
(Name of Filing Persons (Offeror))
Common Stock, \$0.001 par value
(Title of Class of Securities)**

**00508B102
(CUSIP Number of Class of Securities)
Peter I. Cittadini
President and Chief Executive Officer
Actuate Corporation
2207 Bridgepointe Parkway, Suite 500
San Mateo, California 94404
(650) 645-3000**

(Name, address and telephone number of person authorized to receive notices and communications on behalf of filing persons)

***with copies to:*
John Larson, Esq.
William A. Myers, Esq.
Morgan, Lewis & Bockius LLP
One Market Street Spear Street Tower
San Francisco, California 94105
(415) 442-1000**

CALCULATION OF FILING FEE

| Transaction Valuation* | Amount of Filing Fee** |
|-------------------------------|-------------------------------|
| \$60,000,000 | \$2,358.00 |

* Estimated solely for purposes of calculating the filing fee pursuant to Rules 0-11 under the Securities Exchange Act of 1934, as amended, based on the dollar

amount to be used in the purchase of shares in the tender offer described in this Schedule TO.

** The amount of the filing fee, calculated in accordance with Rule 0-11(b) of the Securities Exchange Act of 1934, as amended, equals \$39.30 per million of the aggregate amount of transaction value.

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

| | |
|---------------------------|-----|
| Amount Previously Paid: | N/A |
| Form or Registration No.: | N/A |
| Filing Party: | N/A |
| Date Filed: | N/A |

o Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transactions to which the statement relates:

o third-party tender offer subject to Rule 14d-1.

o issuer tender offer subject to Rule 13e-4.

o going-private transaction subject to Rule 13e-3.

o amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer: o

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This Tender Offer Statement on Schedule TO (together with the exhibits hereto, this **Schedule TO**) relates to a tender offer by Actuate Corporation (**Actuate** or the **Company**) to purchase up to a maximum of \$60 million worth of its common stock, par value \$0.001 per share, at a price not more than \$3.40 nor less than \$3.15 per share, to the seller in cash, without interest, upon the terms and subject to the conditions set forth in the offer to purchase, dated November 5, 2008 (the **Offer to Purchase**) and the accompanying letter of transmittal (the **Letter of Transmittal**), which together, as each may be amended and supplemented from time to time, constitute the tender offer (the **Offer**). This Schedule TO is intended to satisfy the reporting requirements of Rule 13e-4(c)(2) of the Securities Exchange Act of 1934, as amended.

The information contained in the Offer to Purchase and the accompanying Letter of Transmittal, copies of which are attached to this Schedule TO as Exhibits (a)(1)(A) and (a)(1)(B), respectively, is incorporated herein by reference in response to all of the items of this Schedule TO as more particularly described below.

ITEM 1. SUMMARY TERM SHEET

The information set forth in the Summary Term Sheet of the Offer to Purchase is incorporated herein by reference.

ITEM 2. SUBJECT COMPANY INFORMATION

(a) *Name and Address.* The name of the issuer is Actuate Corporation. The address of its principal executive offices is 2207 Bridgepointe Parkway, Suite 500, San Mateo, California 94404. The telephone number of the principal executive offices of Actuate is (650) 645-3000.

(b) *Securities.* The information set forth in the Introduction to the Offer to Purchase is incorporated herein by reference.

(c) *Trading and Market Price.* The Company's common stock is traded on the NASDAQ Global Market under the symbol ACTU. The information set forth in Section 8 of the Offer to Purchase (**Price Range of Shares**) is incorporated herein by reference.

ITEM 3. IDENTITY AND BACKGROUND OF FILING PERSON

The Company is the filing person. The Company's address and telephone number are set forth in Item 2 above. The information set forth in Section 11 of the Offer to Purchase (**Interests of Directors and Executive Officers; Transactions and Arrangements Concerning the Shares**) is incorporated herein by reference.

ITEM 4. TERMS OF THE TRANSACTION

(a) *Material Terms.* The following sections of the Offer to Purchase contain information regarding the material terms of the transaction and are incorporated herein by reference:

Summary Term Sheet;

Introduction;

Section 1 (**Number of Shares; Proration; Odd Lots**);

Section 2 (**Purpose of the Offer; Certain Effects of the Offer; Other Plans or Proposals**);

Section 3 (**Procedures for Tendering Shares**);

Section 4 (**Withdrawal Rights**);

Section 5 (**Purchase of Shares and Payment of Purchase Price**);

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Section 6 (Conditional Tender of Shares);

Section 7 (Conditions of the Offer);

Section 9 (Source and Amount of Funds);

Section 11 (Interests of Directors and Executive Officers; Transactions and Arrangements Concerning the Shares);

Section 14 (Certain United States Federal Income Tax Consequences); and

Section 15 (Extension of the Offer; Termination; Amendment).

(b) *Purchases*. The information set forth in the Introduction to the Offer to Purchase and in Section 11 of the Offer to Purchase (Interests of Directors and Executive Officers; Transactions and Arrangements Concerning the Shares) is incorporated herein by reference.

ITEM 5. PAST CONTACTS, TRANSACTIONS, NEGOTIATIONS AND AGREEMENTS

(e) *Agreements Involving the Subject Company's Securities*. The information set forth in Section 11 of the Offer to Purchase (Interests of Directors and Executive Officers; Transactions and Arrangements Concerning the Shares) is incorporated herein by reference.

ITEM 6. PURPOSES OF THE TRANSACTION AND PLANS OR PROPOSALS

(a); (b); (c) *Purposes; Use of Securities Acquired; Plans*. The following sections of the Offer to Purchase, which contain information regarding the purposes of the transaction, the use of securities acquired in the transaction and plans, are incorporated herein by reference:

Summary Term Sheet; and

Section 2 (Purpose of the Offer; Certain Effects of the Offer; Other Plans or Proposals).

ITEM 7. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION

(a); (b); (d) *Source of Funds; Conditions; Borrowed Funds*. The information set forth in Section 9 (Source and Amount of Funds) and Section 7 (Conditions of the Offer) of the Offer to Purchase is incorporated herein by reference.

ITEM 8. INTEREST IN SECURITIES OF THE SUBJECT COMPANY

(a); (b) *Securities Ownership; Securities Transactions*. The information set forth in Section 11 of the Offer to Purchase (Interests of Directors and Executive Officers; Transactions and Arrangements Concerning Shares) is incorporated herein by reference.

ITEM 9. PERSONS/ASSETS, RETAINED, EMPLOYED, COMPENSATED OR USED

(a) *Solicitations or Recommendations*. The information set forth in Section 16 of the Offer to Purchase (Fees and Expenses) is incorporated herein by reference.

ITEM 10. FINANCIAL STATEMENTS

Not applicable.

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ITEM 11. ADDITIONAL INFORMATION

(a) *Agreements, Regulatory Requirements and Legal Proceedings.* The information set forth in Section 11 of the Offer to Purchase (Interests of Directors and Executive Officers; Transactions and Arrangements Concerning Shares), Section 12 of the Offer to Purchase (Effects of the Offer on the Market for Our Shares; Registration Under the Securities Exchange Act of 1934) and Section 13 of the Offer to Purchase (Legal Matters; Regulatory Approvals) is incorporated herein by reference.

(b) *Other Material Information.* The information set forth in the Offer to Purchase and the accompanying Letter of Transmittal, copies of which are filed with this Schedule TO as Exhibits (a)(1)(A) and (a)(1)(B), respectively, as each may be amended or supplemented from time to time, is incorporated herein by reference.

ITEM 12. EXHIBITS

See Exhibit Index immediately following the signature page.

ITEM 13. INFORMATION REQUIRED BY SCHEDULE 13E-3

Not applicable.

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SIGNATURES

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

ACTUATE CORPORATION

Dated: November 5, 2008

By: /s/ Peter I. Cittadini

Name: Peter I. Cittadini

Title: President and Chief Executive Officer

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EXHIBIT INDEX

| Exhibit Number | Document |
|-----------------------|---|
| (a)(1)(A) | Offer to Purchase, dated November 5, 2008. |
| (a)(1)(B) | Form of Letter of Transmittal(including Guidelines of the Internal Revenue Service for Certification of Taxpayer Identification Number on substitute Form W-9). |
| (a)(1)(C) | Form of Notice of Guaranteed Delivery. |
| (a)(1)(D) | Form of Letter to Brokers, Dealers, Banks, Trust Companies and Other Nominees, dated November 5, 2008. |
| (a)(1)(E) | Form of Letter to Clients for Use by Brokers, Dealers, Banks, Trust Companies and Other Nominees., dated November 5, 2008. |
| (a)(2) | Not applicable |
| (a)(3) | Not applicable |
| (a)(4) | Not applicable |
| (a)(5)(A) | Letter from President and Chief Executive Officer to Stockholders |
| (a)(5)(B) | Form of Email to Employees |
| (a)(5)(C) | Press Release issued on November 5, 2008. |
| (b)(1) | Credit Agreement effective as of November 3, 2008 between the Company and Wells Fargo Foothill, LLC, as arranger, administrative agent and lender. ⁽²⁾ |
| (d)(1) | Actuate Corporation Amended and Restated 1998 Equity Incentive Plan. ⁽¹⁾ |
| (g) | Not applicable |
| (h) | Not applicable |

⁽¹⁾ *Incorporated by reference to Exhibit 99.1 to Actuate Corporation on Form S-1 (File No. 333.-55741) filed on June 1, 1998.*

⁽²⁾

*Incorporated by
reference to
Exhibit 10.1 to
Actuate
Corporation on
Form 8-K (File
No. 333-55741)
filed on
November 5,
2008.*