

ACTUATE CORP
Form S-8 POS
May 27, 2008

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As filed with the United States Securities and Exchange Commission on May 27, 2008

Registration No. 333-151004

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

**FORM S-8
(Post-Effective Amendment No. 1)
REGISTRATION STATEMENT
Under
*The Securities Act of 1933***

ACTUATE CORPORATION
(Exact name of registrant as specified in its charter)

DELAWARE
(State or other jurisdiction of
incorporation or organization)

94-3193197
(IRS Employer
Identification No.)

**2207 Bridgepointe Parkway, Suite 500
San Mateo, California 94404
(650) 645-3000**

(Address of principal executive offices) (Zip Code)

**ACTUATE CORPORATION AMENDED AND RESTATED 1998 EQUITY INCENTIVE PLAN
ACTUATE CORPORATION 1998 EMPLOYEE STOCK PURCHASE PLAN
(Full title of the Plans)**

**PETER I. CITTADINI
CHIEF EXECUTIVE OFFICER AND PRESIDENT
ACTUATE CORPORATION
2207 Bridgepointe Parkway, Suite 500
San Mateo, California 94404
(Name and address of agent for service)
(650) 645-3000
(Telephone number, including area code, of agent for service)**

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

Large accelerated filer ☐ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

CALCULATION OF REGISTRATION FEE

Proposed Proposed

Title of Securities to be Registered	Amount of shares to be Registered (1)	Maximum Offering Price per Share (2)	Maximum Aggregate Offering Price (2)	Amount of Registration Fee (3)
Actuate Corporation Amended and Restated 1998 Equity Incentive Plan Common Stock (par value \$.001)	2,800,000	\$ 4.49	\$ 12,572,000	\$494.08
Actuate Corporation 1998 Employee Stock Purchase Plan Common Stock (par value \$.001)	600,000	\$ 4.49	\$ 2,694,000	\$105.87
Total Amount to be Registered	3,400,000	Aggregate Registration Fee		\$599.95

(1) This Registration Statement shall also cover any additional shares of Common Stock which become issuable under the Amended and Restated 1998 Equity Incentive Plan and 1998 Employee Stock Purchase Plan by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without the receipt of consideration which results in an increase in the number of the outstanding shares of Common Stock of Actuate Corporation.

(2)

Calculated
solely for
purposes of this
offering under
Rule 457(c) and
Rule 457(h) of
the Securities
Act of 1933, as
amended, on the
basis of the
average of the
high and low
prices per share
of Common
Stock of
Actuate
Corporation as
reported on the
Nasdaq National
Market on May
14, 2008.

(3) Previously paid.

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EXPLANATORY NOTE:

This Post-Effective Amendment No. 1 is being filed solely to correct Exhibit 23.1 of the Registration Statement on Form S-8, File No. 333-151004, filed with the Securities and Exchange Commission on May 19, 2008. The draft of Exhibit 23.1 was inadvertently filed.

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PART II
INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

Actuate Corporation (the Registrant) hereby incorporates by reference into this Registration Statement the following documents previously filed with the Securities and Exchange Commission (the SEC):

- (a) The Registrant's Registration Statement No. 000-24607 on Form 8-A filed with the SEC on July 10, 1998 pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the 1934 Act) in which there is described the terms, rights and provisions applicable to the Registrant's outstanding Common Stock;
- (b) The Registrant's Form 10-K filed with the SEC for the fiscal year ended December 31, 2007 filed with the SEC on March 14, 2008;
- (c) The Registrant's Form 10-Q filed with the SEC for the fiscal quarter ended March 31, 2008 filed with the SEC on May 9, 2008; and
- (d) All other reports filed pursuant to Section 13(a) or 15(d) of the 1934 Act since the end of the fiscal year covered by the Registrant's Form 10-K referred to in (b) above.

All reports and definitive proxy or information statements filed pursuant to Section 13(a), 13(c), 14 or 15(d) of the 1934 Act after the date of this Registration Statement and prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold shall be deemed to be incorporated by reference into this Registration Statement and to be a part hereof from the date of filing of such documents.

Item 4. Description of Securities

Not Applicable.

Item 5. Interests of Named Experts and Counsel

Item 601(b)(5) of Regulation S-K, promulgated under the Securities Act, requires registrants seeking to register original issuance securities issued under an employee benefit plan to file as an exhibit to its registration statement on Form S-8 an opinion of counsel as to the legality of the securities being registered. Morgan, Lewis & Bockius LLP, Registrant's outside counsel, will pass upon the validity of the shares of the Registrant's Common Stock registered pursuant to this Registration Statement on Form S-8.

Item 6. Indemnification of Directors and Officers

Section 145 of the Delaware General Corporation Law authorizes a court to award or a corporation's board of directors to grant indemnification to directors and officers in terms sufficiently broad to permit such indemnification under certain circumstances for liabilities (including reimbursement for expenses incurred) arising under the Securities Act of 1933 (1933 Act). The Registrant's Bylaws provide for mandatory indemnification of its directors and officers and permissible indemnification of employees and other agents to the maximum extent permitted by the Delaware General Corporation Law. The Registrant's Certificate of Incorporation provides that, pursuant to Delaware law, its directors shall not be liable for monetary damages for breach of their fiduciary duty as directors to the Registrant and its stockholders. This provision in the Certificate of Incorporation does not eliminate the fiduciary duty of the directors, and, in appropriate circumstances, equitable remedies such as injunctive or other forms of non-monetary relief will remain available under Delaware law. In addition, each director will continue to be subject to liability for breach of the director's duty of loyalty to the Registrant for acts or omissions not in good faith or involving intentional misconduct, for knowing violations of law, for actions leading to improper personal benefit to the director and for payment of dividends or approval of stock repurchases or redemptions that are unlawful under Delaware law. The provision also does not affect a director's responsibilities under any other law, such as the federal securities laws or state or federal environmental laws. The Registrant has entered into Indemnification Agreements with its officers and directors. The Indemnification Agreements provide the Registrant's officers and directors with further indemnification to the maximum extent permitted by the Delaware General Corporation Law.

Item 7. Exemption from Registration Claimed

Not Applicable.

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Item 8. Exhibits

Exhibit

Number Exhibit

- 4 Instrument Defining Rights of Stockholders. Reference is made to Registrant's Registration Statement No. 000-24607 on Form 8-A, which is incorporated herein by reference pursuant to Item 3(a) of this Registration Statement.*
- 5 Opinion and consent of Morgan, Lewis & Bockius LLP.*
- 23.1 Consent of KPMG LLP, Independent Registered Public Accounting Firm
- 23.2 Consent of Morgan, Lewis & Bockius LLP is contained in Exhibit 5.*
- 24 Power of Attorney. Reference is made to page II-3 of this Registration Statement.*
- 99.1 Actuate Corporation Amended and Restated 1998 Equity Incentive Plan, which is incorporated by reference to the Registrant's Registration Statement on Form S-1 (File No. 333.-55741).*
- 99.2 Actuate Corporation 1998 Employee Stock Purchase Plan, which is incorporated by reference to the Registrant's Registration Statement on Form S-1 (File No. 333.-55741).*

* Previously filed.

Item 9. Undertakings

A. The undersigned Registrant hereby undertakes: (1) to file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement (i) to include any prospectus required by Section 10(a)(3) of the 1933 Act, (ii) to reflect in the prospectus any facts or events arising after the effective date of this Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in this Registration Statement and (iii) to include any material information with respect to the plan of distribution not previously disclosed in this Registration Statement or any material change to such information in this Registration Statement; provided, however, that clauses (1)(i) and (1)(ii) shall not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the SEC by the Registrant pursuant to Section 13 or Section 15(d) of the 1934 Act that are incorporated by reference in this Registration Statement; (2) that for the purpose of determining any liability under the 1933 Act each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof and (3) to remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the Registrant's 1998 Equity Incentive Plan and 1998 Employee Stock Purchase Plan.

B. The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the 1933 Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the 1934 Act that is incorporated by reference in this Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

C. Insofar as indemnification for liabilities arising under the 1933 Act may be permitted to directors, officers or controlling persons of the Registrant pursuant to the indemnification provisions summarized in Item 6 or otherwise, the Registrant has been advised that, in the opinion of the SEC, such indemnification is against public policy as expressed in the 1933 Act, and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling

person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the 1933 Act and will be governed by the final adjudication of such issue.

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SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of San Mateo, State of California on this 23rd day of May, 2008.

ACTUATE CORPORATION

By: /s/ Daniel A. Gaudreau
Daniel A. Gaudreau, Senior Vice President,
Operations and Chief Financial Officer

Pursuant to the requirements of the Securities Act of 1933, as amended, this Registration Statement has been signed below by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ *	Chairman of the Board and Chief Architect	
Nicolas C. Nierenberg		
/s/ *	President, Chief Executive Officer and Director	
Peter I. Cittadini	(Principal Executive Officer)	
/s/ Daniel A. Gaudreau	Senior Vice President, Operations and Chief Financial Officer	May 23 2008
Daniel A. Gaudreau	(Principal Financial and Accounting Officer)	
/s/ *		
George B. Beitzel		
Director		
/s/ *		

The undersigned by signing his name hereto, does hereby sign and execute this Post-Effective Amendment No. 1 to this Registration Statement on behalf of the above named officers and directors of the Company pursuant to the Power of Attorney executed by such officers and directors previously filed with the Securities and Exchange Commission.

*By: /s/ Daniel A. Gaudreau

Daniel A. Gaudreau,

Attorney-in-fact

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