

SECURITIES & EXCHANGE COMMISSION EDGAR FILING

Form: 8-K

Date Filed: 2014-12-09

Corporate Issuer CIK: 1062478

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

December 9, 2014

Date of Report (Date of earliest event reported)

Actuate Corporation

(Exact name of registrant as specified in its charter)

Delaware
(State of Incorporation)

0-24607
(Commission
File Number)

94-3193197
(IRS Employer
Identification Number)

951 Mariners Island Boulevard
San Mateo, California 94404
(Address of principal executive offices)(Zip Code)

(650) 645-3000
(Registrant's telephone number, including area code)

(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
-
-

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

(e)

Amendment to Change in Control Agreements

As previously disclosed, on December 5, 2014, Actuate Corporation (the “**Company**”), Open Text Corporation, a Canadian corporation (“**Parent**”), and Asteroid Acquisition Corporation, a Delaware corporation and wholly owned subsidiary of Parent (“**Merger Sub**”), entered into an Agreement and Plan of Merger (“**Merger Agreement**”). Pursuant to the Merger Agreement, Parent has agreed to commence promptly a cash tender offer (the “**Offer**”) to acquire all of the shares of the Company’s common stock for a purchase price of \$6.60 per share (the “**Offer Price**”), net to the seller in cash, without interest, on the terms and subject to the conditions set forth in the Merger Agreement. Promptly following the consummation of the Offer, Merger Sub will merge with and into the Company (the “**Merger**”), with the Company surviving the Merger as a wholly owned subsidiary of Parent. In the Merger, each outstanding share of the Company’s common stock will be converted into the right to receive the Offer Price.

The Company previously entered into letter agreements with each of its named executive officers on July 24, 2014 to provide for certain severance benefits in connection with a change in control of the Company (the “**Change in Control Agreements**”). In connection with the Merger, on December 9, 2014, the Company entered into an Amendment to Letter Agreement (the “**CIC Amendments**”), which amends the Change in Control Agreements, effective as of and contingent upon the consummation of the Merger, with each of Nobby Akiha, the Company’s SVP Marketing, Thomas E. McKeever, the Company’s SVP General Counsel & Corporate Development, and Dylan Boudraa, the Company’s SVP of BIRT Engineering & Products.

Each of Mr. Akiha’s, Mr. McKeever’s and Mr. Boudraa’s CIC Amendments provides that the 90-day notice period referenced in the definition of “Involuntary Termination” set forth in the Change in Control Agreements is increased to 180 days and/or the resignation period set forth in Section (ii) of the “Involuntary Termination” definition set forth in the Change in Control Agreements is increased to 210 days. Pursuant to the CIC Amendments, each of Mr. Akiha, Mr. McKeever and Mr. Boudraa waived all performance-vested restricted stock units that remained subject to any performance conditions as of the date of the Merger Agreement.

The foregoing description of the CIC Amendments does not purport to be complete and is qualified in its entirety by reference to the CIC Amendments for each of Mr. Akiha, Mr. McKeever and Mr. Boudraa, which are attached as Exhibits 10.1, 10.2 and 10.3, respectively to this Current Report on Form 8-K and are incorporated herein by reference.

Additional Information and Where to Find It

This communication is neither an offer to purchase nor a solicitation of an offer to sell securities. The tender offer for the outstanding shares of the Company's common stock described in this Current Report on Form 8-K has not commenced. At the time the Offer is commenced, Parent and Merger Sub will file a Tender Offer Statement on Schedule TO with the U.S. Securities and Exchange Commission ("**SEC**"), and the Company will file a Solicitation/Recommendation Statement on Schedule 14D-9 with the SEC. The Tender Offer Statement (including an offer to purchase, a related letter of transmittal and other offer documents) and the Solicitation/Recommendation Statement will contain important information that should be read carefully before any decision is made with respect to the Offer. Those materials and all other documents filed by the Company or Parent or Merger Sub with the SEC will be available at no charge on the SEC's web site at www.sec.gov. The Tender Offer Statement on Schedule TO and related materials may be obtained for free by directing requests to ir@actuate.com. The Schedule 14D-9 Solicitation/Recommendation Statement and such other documents may be obtained for free by directing such requests to ir@actuate.com.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits.

<u>Exhibit No.</u>	<u>Description</u>
10.1	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Nobby Akiha.
10.2	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Thomas E. McKeever.
10.3	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Dylan Boudraa.

SIGNATURES

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

Actuate Corporation

Date: December 9, 2014

By: /s/ Peter I. Cittadini

Name: Peter I. Cittadini

Title: President and Chief Executive Officer

INDEX TO EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
------------------------	--------------------

10.1	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Nobby Akiha.
10.2	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Thomas E. McKeever.
10.3	Amendment to Letter Agreement, dated as of December 9, 2014, by and between Actuate Corporation and Dylan Boudraa.

AMENDMENT TO LETTER AGREEMENT

This Agreement (the "Amendment") is entered into by and between Nobby Akiha (the "Executive") and Actuate Corporation, a Delaware corporation (the "Company") as of December 9, 2014.

WHEREAS, the Company has entered into an Agreement and Plan of Merger (the "Merger Agreement") with Open Text Corporation, a Canadian corporation ("Parent"), and certain other parties, pursuant to which a subsidiary of Parent will merge with and into the Company (the "Merger").

WHEREAS, in connection with and contingent on the effectiveness of the Merger (the "Effective Time"), the Company and the Executive have agreed to amend that certain letter agreement, dated as of July 24, 2014, by and between the Company and the Executive (the "Prior Agreement") to increase the time (from ninety (90) days to one hundred and eighty (180) days) that the Executive has to notify the Company of the grounds for an Involuntary Termination (as defined in the Prior Agreement).

NOW, THEREFORE, in consideration of the foregoing premises and for good and valuable consideration, receipt of which is hereby acknowledged, the Executive and the Company, intending to be legally bound, hereby agree as follows:

1. At, and subject to the occurrence of, the Effective Time, the first line in clause (ii) of the definition of "Involuntary Termination" in the Prior Agreement shall be amended so that the reference to "one hundred eighty (180) days" shall be replaced with a reference to "two hundred and ten (210) days."
2. At, and subject to the occurrence of, the Effective Time, the last paragraph of the definition of "Involuntary Termination" in the Prior Agreement shall be replaced with the following paragraph:

"In no event shall you have the right to resign for any of the reasons listed in subparagraph (ii) above and thereby trigger an Involuntary Termination unless (a) you first notify the Corporation in writing of the existence of the relevant event or transaction constituting grounds for such an Involuntary Termination within one hundred and eighty (180) days after the occurrence of such event or transaction and (b) the Corporation fails to remedy the event or transaction constituting grounds for such Involuntary Termination within a reason cure period of at least thirty (30) days after receipt of such notice."
3. Each Company restricted stock unit that is subject to performance-based vesting conditions and held by the Executive as of December 5, 2014 and as set forth on Section 2.08(c)(ii) of Company's Disclosure Schedules to the Merger Agreement (the "Cancelled PSUs"), shall be cancelled as of the Effective Time without any consideration being payable by the Company, Parent, their affiliates or otherwise and that from and following the Effective Time, the Executive will have no further rights with respect to the Cancelled PSUs.
4. If the Effective Time does not occur, this Amendment shall be void and of no force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company and the Executive have executed this Amendment on the day and year first above written.

EXECUTIVE

/s/ Nobby Akiha
Nobby Akiha

ACTUATE CORPORATION

By: /s/ Thomas E. McKeever
Name: Thomas E. McKeever
Title: Senior Vice President, General Counsel

[Signature Page to Amendment]

AMENDMENT TO LETTER AGREEMENT

This Agreement (the "Amendment") is entered into by and between Thomas E. McKeever (the "Executive") and Actuate Corporation, a Delaware corporation (the "Company") as of December 9, 2014.

WHEREAS, the Company has entered into an Agreement and Plan of Merger (the "Merger Agreement") with Open Text Corporation, a Canadian corporation ("Parent"), and certain other parties, pursuant to which a subsidiary of Parent will merge with and into the Company (the "Merger").

WHEREAS, in connection with and contingent on the effectiveness of the Merger (the "Effective Time"), the Company and the Executive have agreed to amend that certain letter agreement, dated as of July 24, 2014, by and between the Company and the Executive (the "Prior Agreement") to increase the time (from ninety (90) days to one hundred and eighty (180) days) that the Executive has to notify the Company of the grounds for an Involuntary Termination (as defined in the Prior Agreement).

NOW, THEREFORE, in consideration of the foregoing premises and for good and valuable consideration, receipt of which is hereby acknowledged, the Executive and the Company, intending to be legally bound, hereby agree as follows:

1. At, and subject to the occurrence of, the Effective Time, the first line in clause (ii) of the definition of "Involuntary Termination" in the Prior Agreement shall be amended so that the reference to "one hundred eighty (180) days" shall be replaced with a reference to "two hundred and ten (210) days."
2. At, and subject to the occurrence of, the Effective Time, the last paragraph of the definition of "Involuntary Termination" in the Prior Agreement shall be replaced with the following paragraph:

"In no event shall you have the right to resign for any of the reasons listed in subparagraph (ii) above and thereby trigger an Involuntary Termination unless (a) you first notify the Corporation in writing of the existence of the relevant event or transaction constituting grounds for such an Involuntary Termination within one hundred and eighty (180) days after the occurrence of such event or transaction and (b) the Corporation fails to remedy the event or transaction constituting grounds for such Involuntary Termination within a reason cure period of at least thirty (30) days after receipt of such notice."
3. Each Company restricted stock unit that is subject to performance-based vesting conditions and held by the Executive as of December 5, 2014 and as set forth on Section 2.08(c)(iii) of Company's Disclosure Schedules to the Merger Agreement (the "Cancelled PSUs"), shall be cancelled as of the Effective Time without any consideration being payable by the Company, Parent, their affiliates or otherwise and that from and following the Effective Time, the Executive will have no further rights with respect to the Cancelled PSUs.
4. If the Effective Time does not occur, this Amendment shall be void and of no force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company and the Executive have executed this Amendment on the day and year first above written.

EXECUTIVE

/s/ Thomas E. McKeever
Thomas E. McKeever

ACTUATE CORPORATION

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

[Signature Page to Amendment]

AMENDMENT TO LETTER AGREEMENT

This Agreement (the "Amendment") is entered into by and between Dylan Boudraa (the "Executive") and Actuate Corporation, a Delaware corporation (the "Company") as of December 9, 2014.

WHEREAS, the Company has entered into an Agreement and Plan of Merger (the "Merger Agreement") with Open Text Corporation, a Canadian corporation ("Parent"), and certain other parties, pursuant to which a subsidiary of Parent will merge with and into the Company (the "Merger").

WHEREAS, in connection with and contingent on the effectiveness of the Merger (the "Effective Time"), the Company and the Executive have agreed to amend that certain letter agreement, dated as of July 24, 2014, by and between the Company and the Executive (the "Prior Agreement") to increase the time (from ninety (90) days to one hundred and eighty (180) days) that the Executive has to notify the Company of the grounds for an Involuntary Termination (as defined in the Prior Agreement).

NOW, THEREFORE, in consideration of the foregoing premises and for good and valuable consideration, receipt of which is hereby acknowledged, the Executive and the Company, intending to be legally bound, hereby agree as follows:

1. At, and subject to the occurrence of, the Effective Time, the first line in clause (ii) of the definition of "Involuntary Termination" in the Prior Agreement shall be amended so that the reference to "one hundred eighty (180) days" shall be replaced with a reference to "two hundred and ten (210) days."
2. At, and subject to the occurrence of, the Effective Time, the last paragraph of the definition of "Involuntary Termination" in the Prior Agreement shall be replaced with the following paragraph:

"In no event shall you have the right to resign for any of the reasons listed in subparagraph (ii) above and thereby trigger an Involuntary Termination unless (a) you first notify the Corporation in writing of the existence of the relevant event or transaction constituting grounds for such an Involuntary Termination within one hundred and eighty (180) days after the occurrence of such event or transaction and (b) the Corporation fails to remedy the event or transaction constituting grounds for such Involuntary Termination within a reason cure period of at least thirty (30) days after receipt of such notice."
3. Each Company restricted stock unit that is subject to performance-based vesting conditions and held by the Executive as of December 5, 2014 and as set forth on Section 2.08(c)(ii) of Company's Disclosure Schedules to the Merger Agreement (the "Cancelled PSUs"), shall be cancelled as of the Effective Time without any consideration being payable by the Company, Parent, their affiliates or otherwise and that from and following the Effective Time, the Executive will have no further rights with respect to the Cancelled PSUs.
4. If the Effective Time does not occur, this Amendment shall be void and of no force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company and the Executive have executed this Amendment on the day and year first above written.

EXECUTIVE

/s/ Dylan Boudraa
Dylan Boudraa

ACTUATE CORPORATION

By: /s/ Thomas E. McKeever
Name: Thomas E. McKeever
Title: Senior Vice President, General Counsel

[Signature Page to Amendment]