

SECURITIES AND EXCHANGE COMMISSION

FORM 8-K

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Qumu Corp

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**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**

Date of Report (date of earliest event reported): **February 18, 2021**

Qumu Corporation

(Exact name of Registrant as Specified in its Charter)

Minnesota

(State Or Other Jurisdiction Of Incorporation)

000-20728

(Commission File Number)

41-1577970

(I.R.S. Employer Identification No.)

400 S. 4th Street, Suite 401-412

Minneapolis, MN

(Address Of Principal Executive Offices)

55415

(Zip Code)

(612) 638-9100

Registrant's Telephone Number, Including Area Code

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
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol	Name of each exchange on which registered
Common stock, par value \$0.01	QUMU	The Nasdaq Stock Market LLC

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934. []

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. []

Items under Sections 1 through 4 and 6 through 8 are not applicable and therefore omitted.

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

2020 Annual Company Bonus Plan Results

As previously reported, on July 23, 2020 the Compensation Committee of Qumu Corporation (the “Company”) adopted an annual company bonus plan for 2020 (the “2020 Company Bonus Plan”). At that time, the Compensation Committee also set the cash incentive pay opportunities under the 2020 Company Bonus Plan for the Company’s eligible employees. With respect to the Company’s Chief Executive Officer, TJ Kennedy, and the Company’s Chief Financial Officer, David G. Ristow, the Compensation Committee approved the cash pay that may earn at the target level of achievement as a percentage of their respective salaries as follows: Messrs. Kennedy and Ristow, 100% and 50%, respectively. As agreed in Mr. Kennedy’s offer letter, Mr. Kennedy’s cash incentive pay was pro-rated for the 2020 calendar year.

Under the 2020 Company Bonus Plan, the Compensation Committee set target amounts of three performance goals for 2020: revenue, adjusted EBITDA loss and gross customer retention rate, which were weighted 40%, 40% and 20%, respectively. Under the 2020 Company Bonus Plan, the target level of achievement was also the minimum level of achievement such that achievement of a performance goal at less than target level would result in no incentive pay with respect to that performance goal. Achievement of a performance goal at greater than target level would result in proportionately increasing incentive pay relating to that performance goal.

On February 18, 2021, the Compensation Committee determined achievement of the three performance goals for 2020. The Company’s 2020 gross customer retention rate achieved the target amount set by the Compensation Committee, resulting in achievement of 20% of the target bonus amounts under the 2020 Company Bonus Plan. The Company’s 2020 revenue and adjusted EBITDA loss failed to meet the target amount set by the Compensation Committee. However, due to the significant expense associated with extraordinary events in 2020 (including the now-terminated merger with Synacor, Inc. and the Chief Executive Officer transition) and additional expense and investment associated with implementation of the Company’s long-term strategic roadmap which was not anticipated by the Compensation Committee at the time the adjusted EBITDA loss target amount was set, the Compensation Committee determined to exercise its discretion to increase the payout under the 2020 Company Bonus Plan to 60% of the target bonus amounts. In exercising this discretion, the Compensation Committee also considered whether adjusted EBITDA would have been met without these costs and investments. The Compensation Committee also considered employee retention and the financial and non-financial achievements of the Company that were not reflected in the 2020 performance goals of the 2020 Company Bonus Plan. Accordingly, the payouts under the 2020 Company Bonus Plan to Mr. Kennedy and Mr. Ristow will be \$101,096 and \$90,000, respectively.

Executive Officer Designation

On February 18, 2021, the Board of Directors of the Company determined that Jason Karp, the Company’s Chief Commercial Officer/Chief Counsel, is an “officer” under Rule 16a-1(f) and an “executive officer” under Rule 3b-7 of the Securities Exchange Act of 1934, as amended. Mr. Karp was also appointed as the Company’s Secretary effective February 18, 2021.

Mr. Karp joined the Company on November 2, 2020 as its Chief Commercial Officer/Chief Counsel. Prior to joining the Company, he served as the Chief Executive Officer of Allerio, Inc., a telemedicine platform as a service (PaaS) company that provides lifesaving technology to public safety agencies, from July 2020 to October 2020. He also served as SVP Corporate Development, General Counsel, Secretary, and Director of Allerio, Inc. from October 2019 to July 2020. He was one of the founders and Board members of The Public Safety Network, a company focused on communications technology solutions to meet the mission critical needs of public safety, where he had served since January 2018. In addition, he served as Vice President, Board Secretary and Treasurer of The Public Safety Technology Alliance, a nonprofit coalition with a mission of adopting open, best-in-class, standards-based technology for the public safety user community from June 2018 to December 2020. From March 2016 to December 2020, Mr. Karp served as a Partner of Outside GC LLC, a

team of senior legal executives providing outside general counsel services to clients on an as-needed, part-time basis. From April 2015 to January 2018, Mr. Karp served as Chief Counsel of First Responder Network Authority (FirstNet.gov), which designed and oversaw the world's first nationwide 4G LTE wireless network dedicated to first responders. In this role, he was responsible for all First Responder Network Authority's legal and compliance matters, managing the Chief Counsel's office, member of executive staff, and counsel to the First Responder Network Authority Board. He received a Juris Doctor degree from New York University and a Bachelor of Science in Engineering degree from Duke University.

Pursuant to the terms of his offer letter with the Company, Mr. Karp's annual base salary was initially set at \$300,000, payable according to the Company's regular payroll practices. Mr. Karp was eligible to participate in the Company's 2020 Company Bonus Plan and eligible for incentive compensation with a value of 50% of his base salary at the target level, pro-rated for the 2020 calendar year. Mr. Karp will also participate in the Company's 401(k) plan and health, dental, disability and life insurance and other benefit plans on the same basis as other employees of the Company.

Pursuant to the terms of his offer letter with the Company, Mr. Karp was granted a seven year non-qualified stock option to purchase 200,000 shares of the Company's common stock on November 12, 2020. The option has an exercise price equal to the fair market value of the Company's common stock as of the grant date and vests with respect to 25% of the shares underlying the option on the first four anniversaries of his hire date. The stock option award was granted under the Company's Second Amended and Restated 2007 Stock Incentive Plan, as amended (the "2007 Plan") and subject to a form of stock option agreement consistent therewith.

Also effective November 2, 2020, Mr. Karp entered into the Company's current form of letter agreement relating to severance and change of control benefits (the "letter agreement") in substantially the form attached as Exhibit 10.3 to the Company's Current Report on Form 8-K dated February 21, 2013 and summarized therein. Except with respect to the letter agreement, Mr. Karp's employment with the Company is "at will." Mr. Karp also entered into the Company's standard agreement with employees governing assignment of inventions, confidential information and non-competition.

2021 Compensation Determinations

On February 18, 2021, the Compensation Committee of the Company set annual base salaries of the executive officers as follows: TJ Kennedy, Chief Executive Officer, \$375,000; David G. Ristow, Chief Financial Officer, \$325,000; and Jason Karp, Chief Commercial Officer/Chief Counsel, \$325,000.

Also on February 18, 2021, the Compensation Committee adopted an annual company bonus plan for 2021 (the "2021 Company Bonus Plan") and set the cash incentive pay opportunities under the 2021 Company Bonus Plan for the Company's eligible employees, which include Messrs. Kennedy, Ristow and Karp.

Under the 2021 Company Bonus Plan, the Compensation Committee determined target amounts of three performance goals for 2021: revenue, adjusted EBITDA loss and customer net retention rate, which will be weighted equally. Revenue will be determined in conformity with U.S. generally accepted accounting principles. Adjusted EBITDA is defined as the Company's net income (loss) excluding items related to interest income and expense, the impact of income-based taxes, depreciation and amortization, stock-based compensation, change in fair value of warrant liabilities, foreign currency gains and losses, the 2021 Company Bonus Plan amounts and other non-operating income and expenses. Customer net retention rate is the percentage of software as a service (SaaS) revenue in the year ago quarter that remains in current quarter, after accounting for both churn and upsell. The Compensation Committee retains the discretion to include or exclude items from each of the performance goals and to determine the achievement of the performance goals for the purposes of calculating incentive pay under the 2021 Company Bonus Plan.

Under the 2021 Company Bonus Plan, the target level of achievement is also the minimum level of achievement such that achievement of a performance goal at less than target level will result in no incentive pay with respect to that performance goal. Achievement of a performance goal at greater than target level will result in proportionately increasing incentive pay relating to that performance goal. However, under the 2021 Company Bonus Plan, the maximum incentive pay that may be earned by an executive officer will not exceed 150% his incentive pay at the target level, even if actual performance exceeds the maximum level for any or all of the performance goals.

On February 18, 2021, the Compensation Committee also approved the cash incentive pay that the executive officers may earn at the target level of achievement as a percentage of their respective salaries as follows: Messrs. Kennedy, Ristow and Karp, 100%, 50% and 50%, respectively.

All incentive pay earned under the 2021 Company Bonus Plan will be determined in the first quarter of 2022 based upon the Company's audited financial results for 2021. A participant in the 2021 Company Bonus Plan, including an executive officer, must be employed by the Company as of December 31, 2021 and as of the payment date in order to receive any incentive pay under the 2021 Company Bonus Plan unless otherwise provided in the Company's letter agreement with the executive officer relating to severance and change in control benefits. Additionally, all incentive payments are subject to "clawback" to the extent required by federal law and the 2007 Plan.

Additionally, on February 18, 2021, the Compensation Committee approved the award of an aggregate of 314,672 performance stock units ("PSUs") to the Company's executive officers and members of management under the 2007 Plan. The Compensation Committee approved PSU awards to Messrs. Kennedy, Ristow and Karp of 48,000 PSUs, 31,500 PSUs and 31,500 PSUs, respectively.

The PSUs represent a contractual right to receive shares of the Company's common stock upon the achievement of performance goals for a two year performance period. Half of each award of PSUs will vest based upon achievement of 2021 performance goals and half of each award of PSUs will vest based upon achievement of 2022 performance goals. On February 18, 2021, the Compensation Committee set the target amounts of five performance goals for 2021: net new customers, partner generated revenue increase, annual recurring revenue, gross dollar value retention percentage and bookings. For the 2022 performance period, the Compensation Committee also set the target amounts for net new customers and partner generated revenue increase, but will determine target amounts of annual recurring revenue, gross dollar value retention percentage and bookings at the time the Company's Board of Directors approves the Company's annual operating plan for 2022 in the first quarter of 2022.

If the Company achieves three of the five performance goals for a performance period, 100% of the PSU award relating to such period will vest and be settled. If the Company achieves two of the five performance goals for a performance period, 66 2/3% of the PSU award relating to such period will vest and be settled. If the Company achieves one of the five performance goals for a performance period, 33 1/3% of the PSU award relating to such period will vest and be settled. In settlement of the PSUs, the Company will issue a number of shares as is equal to the number of PSUs for that performance period multiplied by the total percentage achievement of the performance goals for that performance period. The shares issued will be restricted from transfer for a period of 364 days following issuance. The PSU award and the restricted shares are subject to forfeiture for termination of employment for any reason.

The Compensation Committee will determine achievement of the performance goals following the end of the performance period and retains the discretion to include or exclude items from any of the performance goals for any performance period. Upon a change of control, the PSUs and the restricted shares will vest in full and any restrictions will lapse. Additionally, the awards are subject to "clawback" to the extent required by federal law and the 2007 Plan.

The form of PSU award agreement approved on February 18, 2021 is attached hereto as Exhibit 10.2 and incorporated by reference herein.

Item 9.01 Financial Statements and Exhibits.

<u>Exhibit No.</u>	<u>Description</u>
10.1	Letter Agreement Regarding Severance and Change In Control Benefits between Qumu Corporation and Jason Karp (incorporated by reference to form of agreement attached as Exhibit 10.3 to the Company's Current Report on Form 8-K dated February 21, 2013).
10.2	Form of Qumu Corporation Performance Stock Unit Award Agreement approved February 18, 2021.

SIGNATURE

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.

QUMU CORPORATION

By: */s/ David G. Ristow*

David G. Ristow
Chief Financial Officer

Date: February 24, 2021

**QUMU CORPORATION
PERFORMANCE STOCK UNIT AWARD AGREEMENT**

Participant:**Grant: Performance Stock Units****Grant Date:** _____, 2021

THIS PERFORMANCE STOCK UNIT AWARD AGREEMENT (this “Agreement”) is made as of the Grant Date set forth above, by and between Qumu Corporation, a Minnesota corporation (the “Company”), and the Participant named above (“Participant”) setting forth the terms and conditions of an award of Performance Stock Units granted to Participant pursuant to the Qumu Corporation Second Amended and Restated 2007 Stock Incentive Plan, as amended and as may be further amended from time to time (the “Plan”).

1. **Grant.** Effective on the Grant Date, Participant has been granted the number of Performance Stock Units indicated above, which entitles Participant to receive up to the same number of shares of common stock of the Company (the “Shares”) in accordance with the provisions of this Agreement and the provisions of the Plan. Capitalized terms used herein and not defined shall have the meaning given such terms in the Plan.

2. Performance Vesting; Forfeiture.

a. As used in this Agreement, the following terms shall have the respective meanings:

i. “Determination Date” means the date of determination and certification by the Committee of achievement of the Percentage Achievement of the Performance Goals for Performance Period 1 or Performance Period 2.

ii. “Percentage Achievement” means the respective percentage achievement (which shall not be more than 100%) of the Performance Goals for Performance Period 1 and Performance Period 2, as determined by the Committee.

iii. “Performance Goals” mean those performance goals set forth on Exhibit A.

iv. “Performance Period 1” shall mean the period from January 1, 2021 to and including December 31, 2021.

v. “Performance Period 2” shall mean the period from January 1, 2022 to and including December 31, 2022.

b. For Performance Period 1, one-half (1/2) of the Performance Stock Units will vest on the Determination Date as to such number of Performance Stock Units multiplied by the Percentage Achievement, rounded down to the nearest whole Share.

c. For Performance Period 2, one-half (1/2) of the Performance Stock Units will vest on the Determination Date as to such number of Performance Stock Units multiplied by the Percentage Achievement, rounded down to the nearest whole Share.

d. If Participant’s employment with the Company and/or a subsidiary of the Company terminates for any reason, including, but not limited to death, Disability or Retirement, all Performance Stock Units at that time not vested shall be forfeited to the Company without payment of any consideration therefor as of the date of such termination unless the Committee determines that all or any part of the Performance Stock Units shall vest as of the date of such termination.

e. Notwithstanding any other provision of this Agreement, if there is a Change in Control of the Company, the Performance Stock Units will fully (100%) vest and no longer be subject to the restrictions of, and risk of forfeiture under, this Agreement.

3. Maturity and Issuance of Shares; Restricted Shares. The “Maturity Date” for a particular Performance Stock Unit shall be the earliest date on which the Performance Stock Units vest and all restrictions described in Section 2 on such Performance Stock Units lapse. Upon the Maturity Date for a particular Performance Stock Unit, the Company shall, within 90 days of such date (30 days in the event of a Change in Control) issue and deliver to Participant one Share in settlement of that Performance Stock Unit and such Shares so earned and issued shall be subject to the Restrictions during the Restricted Period (as described herein) and upon issuance shall be referred to herein as the “Restricted Shares”; provided that notwithstanding the later delivery to Participant of Restricted Shares, Participant shall be deemed to be the record owner of such Restricted Shares on the Maturity Date. Certificates evidencing Restricted Shares shall be deposited with the Company to be held in escrow or shall be issued in restricted book-entry until such Shares are released to Participant or forfeited in accordance with this Agreement. If any Restricted Shares are forfeited, the Company shall direct the transfer agent for the Shares to make the appropriate entries in its records showing the cancellation of the certificate or certificates for such Restricted Shares and the Shares represented thereby shall have the status as authorized but unissued Shares.

4. Restricted Shares. During the period from the Maturity Date and prior to the lapse of the restrictions as set forth in Sections 5(b) and 6 (the “Restricted Period”) and subject to earlier termination of the Restricted Period or forfeiture of the Restricted Shares, the Restricted Shares, and all rights with respect to the Restricted Shares, may not be sold, assigned, transferred, exchanged, pledged, hypothecated or otherwise encumbered or disposed of and shall be subject to the risk of forfeiture contained in Section 5 of this Agreement (such limitations on transferability and risk of forfeiture being herein referred to as “Restrictions”), but Participant shall have all other rights of a Company shareholder with respect to the Restricted Shares, including, but not limited to, the right to vote and receive dividends on the Restricted Shares.

5. Forfeiture of Restricted Shares.

(a) **Termination of Employment.** If Participant’s employment with the Company and/or a subsidiary of the Company terminates for any reason, including, but not limited to death, Disability or Retirement, all Shares that at that time are Restricted Shares shall be forfeited to the Company without payment of any consideration therefor as of the date of such termination unless the Committee determines that the Restrictions shall lapse on all or any part of the Restricted Shares as of the date of such termination.

2

(b) **Change in Control.** Notwithstanding any other provision of this Agreement, if there is a Change in Control of the Company during the Restricted Period, the Restricted Shares will fully (100%) vest and the Restrictions shall lapse on the Restricted Shares to the extent such Restrictions have not already lapsed pursuant to Section 6 such that the Restricted Shares will no longer be subject to the restrictions of, and risk of forfeiture under, this Agreement.

6. Lapse of Restrictions. Except as provided in Section 5, the Restrictions on any Restricted Shares granted under this Agreement shall lapse as to such Restricted Shares on the 364th day from the Maturity Date relating to such Restricted Shares. Upon lapse of the Restrictions in accordance with this Section, the Company shall, as soon as practicable thereafter, deliver to Participant a certificate for the Shares with respect to which such Restrictions have lapsed or direct the transfer agent for the Shares to credit Participant’s book entry account with such number of Shares.

7. No Rights As Shareholder in Performance Stock Units. Until Restricted Shares are issued in settlement of the Performance Stock Units on the Maturity Date, Participant will not be deemed for any purpose to be, or have rights as, a Company shareholder or receive dividends with respect to Shares issuable with respect to the Performance Stock Units, except as provided below. Participant is not entitled to vote any Shares by virtue of the award of Performance Stock Units until the Restricted Shares are issued in settlement of the Performance Stock Units.

8. Dividend Equivalents. During the period from the Grant Date to the Maturity Date, the Company shall accumulate a cash amount equal to dividends in cash or property paid from time to time on issued and outstanding Shares in an amount that is equivalent to the dividends which Participant would have received had Participant been the owner of the number of Shares equal to the number of Performance Stock Units granted hereunder. The cash shall accumulate as a book entry on the books of the Company and shall accrue interest until the Maturity Date computed using the one-year Treasury Bill rate as of January 1 of the calendar year for which interest is credited. A cash amount plus interest (collectively, “Dividends”) shall be paid to Participant on the Maturity Date in respect of the number of Performance Stock Units vested on the Maturity Date. The payment of Dividends and interest hereunder shall be treated as additional compensation to Participant.

9. **No Transferability.** Neither the Performance Stock Units, nor the Restricted Shares nor any interest or right therein or part thereof shall be subject to disposition by transfer, alienation, anticipation, pledge, hypothecation, encumbrance, assignment or any other means, whether such disposition be voluntary or involuntary or by operation of law by judgment, levy, attachment, garnishment or any other legal or equitable proceedings (including bankruptcy), and any attempted disposition thereof shall be null and void and of no effect.

10. **Administration and Compliance with Section 409A of the Code.** This Agreement is intended to comply with Section 409A of the Code or be exempt from Section 409A of the Code and shall be construed and interpreted in accordance with such intent. Any provision of this Agreement that would fail to satisfy Section 409A of the Code shall be amended to comply with Section 409A of the Code on a timely basis, which may be made on a retroactive basis, in accordance with regulations and other guidance issued under Section 409A of the Code. This Agreement may be terminated by mutual agreement between Participant and the Company prior to the date all amounts have been distributed to Participant only if the termination complies with Section 409A of the Code.

3

11. **Successors and Heirs.** This Agreement shall be binding upon and inure to the benefit of the Company and its successors and assigns, and upon any person acquiring, whether by merger, consolidation, purchase of assets or otherwise, all or substantially all of the Company's assets and business. In the event of Participant's death, any Shares to which Participant may become entitled pursuant to this Agreement or the Plan will be delivered to his or her heirs or personal representative in accordance with the terms of the Plan.

12. **Governing Law.** This Agreement and any matter relating to the Performance Stock Units will be construed, administered and governed in all respects under and by the applicable laws of the State of Minnesota, excluding any conflicts or choice of law rule or principle that might otherwise refer construction or interpretation of this Agreement, the Plan, the award of Performance Stock Units, the issuance of Restricted Shares or the Shares to the substantive law of another jurisdiction.

13. **Tax Withholding.** The Company shall have the power and the right to deduct or withhold, or require Participant to remit to the Company, as a condition precedent for the delivery by the Company of the Shares in settlement of the Performance Stock Units or upon lapse of Restrictions on the Restricted Shares, an amount sufficient to satisfy federal, state and local taxes, domestic or foreign, required by law or regulation to be withheld with respect to any taxable event arising as a result of the grant, vesting or settlement of the Performance Stock Units or the grant, vesting or lapse of Restrictions on the Restricted Shares. Such tax withholding amount may be satisfied by Participant if a U.S. employee in cash or in Shares, either by delivery of Shares already owned by Participant or by authorizing the Company to retain the number of Shares from the Restricted Shares or the Shares issuable to Participant as the Company determines to be sufficient to satisfy such tax withholding obligation. Notwithstanding the foregoing, in no event shall payment of withholding taxes be made by retention of Shares by the Company unless the Company retains only Shares with a Fair Market Value equal to the minimum amount of taxes required to be withheld. The Company may also deduct from any award under the Plan payment of any other amounts due by Participant to the Company.

14. **Plan Controls.** Notwithstanding anything in this Agreement to the contrary, the terms of this Agreement shall be subject to the terms of the Plan. In accordance with the Plan, all decisions of the Committee shall be final and binding upon Participant and the Company.

4

IN WITNESS WHEREOF, the Company and Participant have each executed and delivered this Agreement as of the Grant Date.

QUMU CORPORATION

By: _____
Its: _____

PARTICIPANT:

[NAME OF PARTICIPANT]

5

EXHIBIT A

Performance Goals

The Company's number of net new customers, partner generated revenue percentage increase, annual recurring revenue, gross dollar value retention percentage and bookings for Performance Period 1 and for Performance Period 2 shall equal or exceed the following respective thresholds:

<u>Performance Goals</u>	<u>Performance Period 1</u>	<u>Performance Period 2</u>
Net New Customer	[]	[]
Partner Generated Revenue Increase	[]%	[]%
Annual Recurring Revenue	[\$]	To be determined by the Compensation Committee following the Board's approval of the Company's 2022 annual operating plan.
Gross Dollar Value Retention	[]%	To be determined by the Compensation Committee following the Board's approval of the Company's 2022 annual operating plan.
Bookings	[\$]	To be determined by the Compensation Committee following the Board's approval of the Company's 2022 annual operating plan.

The Percentage Achievement will be as follows for achievement of the respective Performance Goals for either Performance Period 1 or Performance Period 2:

- if any three of the five Performance Goals are achieved, the Percentage Achievement will be 100%;
- if any two of the five Performance Goals are achieved, the Percentage Achievement will be 66 2/3%; and
- if any one of the five Performance Goals are achieved, the Percentage Achievement will be 33 1/3%.

In each case, determination of the Percentage Achievement for the Performance Periods and achievement of each Performance Goal for any Performance Period will be made by the Committee and shall be subject to such adjustments as the Committee shall determine in its sole discretion.