

# **CONTRACTUAL CONSIDERATIONS FOR DIGITAL ASSET CUSTODIANS**

MicroStrategy 2020

## MICROSTRATEGY INCORPORATED

[Redacted]

### Alternative Investments - Digital Assets

## CONTRACTUAL CONSIDERATIONS FOR DIGITAL ASSET CUSTODIANS

The following is a checklist of generally-applicable contractual considerations relevant to custodial services agreements with potential digital asset (“Digital Asset”) custodians. This checklist is intended for general background purposes as it contemplates custodial relationships, and not as guidance for negotiating any specific custodial agreement. In that regard, we note that Digital Asset custodial services agreements vary, and additional or different considerations are likely to apply in context of any specific custodial services agreement.

No.	Provision	Relevant Considerations	Notes
1	Counterparty	Jurisdiction; regulatory approvals and licensing.	Consider the licensing and regulatory approval of the counterparty. A number of states have licensed trust companies to engage in digital asset activity, including South Dakota, Nevada and New York among others.
2	Scope of Services	Segregation of Assets; Additional Services such as Brokerage or Lending; Service Levels	<p>Custody of Digital Assets in “cold storage” can be done on a segregated (i.e., individual private/public key pairs per customer) basis - so that a compromise of one customer’s Digital Assets does not necessary affect other customers. If custody is done on an omnibus basis, consider asking for more detail or assurances regarding asset security.</p> <p>Some custodians offer brokerage (i.e., purchase/sale) services as part of the custodial account agreement, whereas others provide such services through an affiliate arrangement. Consider both (a) how purchase and sales may be arranged through the custodian, and/or (b) how Company could use an independent OTC desk to arrange such purchases (to be deposited at the custodian) or sales (upon withdrawal from the custodian).</p> <p>There may be additional services offered, such as lending, staking, or other ancillary services that may be of interest in the future. Consider evaluating service and performance level commitments.</p>

3	Legal Characterization of Property	Bankruptcy Remoteness, UCC Treatment	Consider the legal manner of holding Digital Assets. Consider whether a custodian’s agreement makes explicit that Digital Assets always remain customer property and never become an asset of the custodian (unlike a bank deposit). To provide additional protections, some custodial agreements contemplate that Digital Assets will be treated as “financial assets” and thereby receive the protections and procedures applicable to securities accounts with securities intermediaries under Article 8 of the UCC, rather than have Digital Assets subject to the (generally less protective) rules applicable to general intangibles / payment intangibles.
4	Fees	Cost; Advance Notice of Fee Changes	Consider comparing costs and notice requirements of fee changes between custodians, including any possible discounts or reductions based on volume, contract length or other parameters.
5	Client Responsibilities and Acknowledgement of Risks	Account Security; FDIC and SIPC Coverage	Evaluate whether the responsibility of the Company with respect to passwords and other sensitive account access information is reasonable and clearly stated in the agreement. Federal insurance protection schemes generally do not extend to Digital Assets and so custodians often seek an acknowledgment regarding the absence of such protections.
6	Onboarding Process and Account Access	Procedures for Establishing Account; Authorizing Persons; API Access	Different custodians may have different onboard or access procedures that should be evaluated on a case by case basis; consider whether forms of integrated access to account information (e.g., via API) may be important.
7	Instructions	Method of Instructions; Reliance on Instructions; Responsibility for Mistakes	Consider whether the method of providing instructions is sufficient. Consider also whether liability for erroneous instructions and/or mistakes is appropriately allocated. Ideally the custodian has clearly-stated protections for ensuring accuracy of instructions (e.g. to avoid fat finger errors) as well.
8	Deposits and Withdrawals	Means of Access; Timing and Delays.	Consider whether the method of access and approval (and any restrictions) is correctly described. Consider also whether timing commitments are sufficient for the Company’s needs (and any liability for delays)
9	Supported Assets	Available Digital Assets; Fiat Currency Integration.	Different custodians support a variety of Digital Assets and maintain differing policies for adding new Digital Assets. In general, custodians may support a wider universe of Digital Assets for storage than brokers may support for trading. Custodians may also have specified procedures in place for fiat currency (i.e. U.S. Dollar) transfers; consider whether these are sufficiently fast for the Company’s transactional objectives.

10	Forks; Airdrops	Policy for Crediting Forks and Airdrops.	Forks and Airdrops are considerations unique to Digital Assets and there is no generic approach, but the client should generally receive forked and airdropped Digital Assets if those Digital Assets are supported by the Custodian. Consider the custodians' policies in consultation with tax/accounting.
11	Privacy and Confidentiality	Access and Use of Data; Disclosure to Third Parties	Custodians may seek to access and use data for certain purposes, or share with third parties. Certain custodians may have more substantive provisions with respect to data, depending on their custodial service's security design.
12	Data and Cybersecurity	Incident Disclosure	Determine whether the custodian has a reasonably tailored data and cybersecurity policy, with appropriate assumption of liability, indemnification obligations, and disclosure obligations in case of a data breach.
13	Account Statements; Taxes; Recordkeeping	Timing and Detail; Access to Auditors; Responsibility for Taxes	<p>Custodians may provide account statements at different times or with different details (including information that may be relevant to tax records). Access to auditors may be granted by custodians as needed. Consider whether the custodian keeps timely records and provides them upon a set notice period.</p> <p>With respect to custodians that offer an integrated purchase/sale service, consider whether the custodian (or its affiliate or service provider who executes purchases/sales) enables customers to execute sale transactions that qualify for FDII tax treatment. In that regard, confirm the specific scope of information that the custodian can obtain regarding the transaction counterparty, and whether it contains comparable information to a Form W8, as well as the type of documentation.</p>
14	Use and Restrictions on Custodian Services	Prohibited Activities	Determine the custodians prohibited activities with respect to accounts.
15	Suspension and Termination	Notice of Account Suspension or Closure	Custodians may reserve the right to suspend or terminate accounts, consider whether appropriate notice and procedures are in place to dispute this and/or withdraw or return Digital Assets.

16	Covenants, Representations and Warranties	Obligation to Provide Information; Licenses and Authorizations; Ownership of Digital Assets	<p>Custodians may request information from the Company for compliance or other purposes and the scope of such information should be appropriately tailored. The Company may also be asked to represent that it owns the Digital Assets free and clear of any security interests. Consider confirming that the custodian is not permitted to use, lend or otherwise transfer Digital Assets without the Company's explicit permission.</p> <p>Some custodians undertake heightened fiduciary obligations to custodial clients, which should be considered as part of comparing custodial options. The Company may also wish to address any cybersecurity or compliance considerations by way of a covenant or representation/warranty.</p>
17	Insurance	Obligation to Maintain Insurance	<p>Custodians may make varying commitments as to the scope, amount and coverage of insurance coverage provided.</p> <p>To the extent the custodian is willing or able to share it (e.g., within confidentiality limitations), some examples of helpful information may include: (a) if insurance coverage is enough to cover all client assets or just a part (and if latter, how customers would be covered if a loss event exceeded available coverage), (b) if the custodian's policy applies exclusively to its customer assets or is under a parent's policy that could face claims from other subsidiaries and (c) what the exclusions to coverage would be.</p>
18	Disclaimers	Liability for Viruses, Digital Asset Specific Events	Disclaimers of liability for different types of information security exploits should be evaluated and compared.
19	Limitation of Liability	Calculation of Digital Asset Value; Damages Cap	Consider how Digital Asset value is calculated for purposes of liability and whether a cap applies to claims. If there is a cap, consider its adequacy for the Company's anticipated custodial needs. Consider whether breaches of confidentiality, breaches of data protection obligations, and indemnification obligations are carved out from a cap.
20	Indemnity; Lien and Right of Set Off	Scope of Indemnity; Account Liens	Evaluate and compare the scope of indemnity with respect to one/two way, scope of persons covered, and scope of activity. Custodians may also seek a lien over the Company's account for unpaid fees or disputed amounts.
21	Dispute Resolution	Arbitration; Governing Law	Evaluate adequacy of dispute resolution procedures, governing law and venue against any internal corporate standards or preferences for vendor contracts.

22	Force Majeure	Internet Associated Events	Internet or distributed network specific events may be included in the list of force majeure events, which are events the Company may wish to evaluate and/or clarify.
23	Assignment; Subcontractors; Act Through Agents	Use of Subsidiaries; Conflicts of Interest	Consider whether the custodian has restrictions or criteria on the use of service providers or contractors (such as a third party vendor program), and whether such service providers or contractors may be subject to different regulatory obligations. Consider also if an integrated service is offered whether any conflicts of interest are adequately addressed.
24	Entire Agreement	Integration with terms of associated brokers or exchanges; integration with terms of certain Digital Assets	Custodians may also offer related services, such as brokerage or exchange (as noted above). Consider comparing the interaction of the custodial services agreement with those provisions. Consider certain U.S. Dollar equivalent Digital Assets (i.e., 'stablecoins') that could conceivably be used in connection with a Digital Asset transaction may also have terms and conditions.

