I. INTRODUCTION

Is business doing more harm than good to society and the environment? One might reach this conclusion after glancing at recent news headlines, which are full of examples of corporate conduct that fall short of societal expectations and reveal ethical failures on the part of business. Such conduct may have negative impacts on consumers, workers and the general public.

Some particularly egregious examples come readily to mind. One headline reads “G.M.’s Ignition Switch Death Toll Hits 100”, referring to General Motors’ failure, prior to 2014, to recall cars containing defective ignition switches that could cut off a car’s engine and electrical system and disable its air bags, even though it had known about the problem for more than a decade. One of the reasons for the failure was the company’s concern with the cost of fixing the problem. Another headline reads “Building Collapse in Bangladesh Leaves Scores Dead”, referring to the 2013 Rana Plaza factory collapse that killed more than 1,000 workers in the deadliest disaster in the history of the garment industry. After an investigation, the cause of the collapse was determined to be the use of substandard materials in violation of local building

codes, violations that were overlooked because of bribes that had been paid.4 This lack of regard for workers’ health and safety attracted international attention because the clothing manufactured under these dangerous conditions bore the labels of well-known brands that were sold through retailers in the United States and Europe.5 Once again, cost considerations figured prominently in this case since low-cost manufacturing production in countries like Bangladesh is possible due to lack of safeguards for worker well-being.6 Yet another headline reads “Oil Spills Into Gulf After Rig Disaster”, referring to the 2010 Deepwater Horizon oil rig explosion that resulted in eleven deaths and led to what has been called the worst environmental disaster in American history, namely a massive oil spill in the Gulf of Mexico that continued for three months before it could be contained, leading to widespread damage to the ecology of the region, including marine life and wildlife.7 Subsequent investigations of these events identified a number of causes, including a series of cost-cutting decisions and use of an insufficient safety system by British Petroleum, the Deepwater Horizon’s lessee, and its partners.8 In all of these cases, and in the many others that also could be cited for the same proposition, business management seems to have made decisions that placed profits ahead of people and the planet.

These cases raise concerns in the public’s mind about the lack of social responsibility and accountability of such enterprises and why their consumer safety, labor, environmental and

human rights records are so poor. Due to such concerns, today’s business leaders are increasingly under pressure to answer for these and other negative impacts of their enterprises on society.

The notion that corporations are accountable for their social and environmental impacts has begun to crystallize under the heading of corporate social responsibility (“CSR”). Of course, businesses are expected to operate within the bounds of the law. However, CSR is a broader concept that goes beyond the expectation of legal compliance. CSR implies voluntary choices on the part of business to operate in a manner that respects people and the planet even if not mandated by government regulators and is now considered part of sustainable business practice.

One feature of CSR that has emerged in recent years is a disclosure-based approach in which companies voluntarily report on non-financial aspects of their operations and in some cases, quantify risks associated with such aspects and explain how they impact financial performance. This type of reporting has been called non-financial reporting, corporate social responsibility reporting, corporate responsibility reporting, sustainability reporting, and triple bottom line reporting. For purposes of this article, it will be referred to as non-financial reporting or CSR reporting.

This approach is an alternative to government regulation and is premised on the notion that enhanced transparency about business operations will lead to improved performance, including improvement on key performance indicators related to CSR. Consistent with the notion of CSR itself, CSR reporting has traditionally involved a voluntary commitment by enterprises to disclose matters beyond the financial performance information mandated by government regulators. However, in recent years, a number of countries have begun to mandate
non-financial reporting in response to concerns about the low rates of such reporting and the poor quality of non-financial disclosures.

A problem plaguing non-financial reporting, both voluntary and mandatory, is the lack of a consistent reporting standard that would permit internal benchmarking and comparison across companies. Many large companies have chosen to use the Global Reporting Initiative’s Sustainability Reporting Guidelines (“GRI Guidelines”) as the basis for their non-financial reporting, making the GRI Guidelines the apparent gold standard. However, national laws on non-financial reporting do not mandate the use of the GRI Guidelines or any other international standard. The result is wide variation in the amount and type of information disclosed.

This article contributes to the literature on corporate social responsibility by focusing on a recent European Union (“EU”) directive mandating that certain large enterprises disclose information about their non-financial performance in key areas of concern to advocates of corporate social responsibility. Pursuant to EU Directive 2014/95/EU (“2014 EU Directive”), EU Member States must enact laws containing certain minimum requirements for such reporting by December 6, 2016.9

The thesis of this paper is as follows. At first glance, the 2014 EU Directive appears to represent a bold move by European governments, since it has been billed as a mandate of non-financial reporting as a matter of national law that will lead to greater information transparency and exert pressure on low-performing businesses to improve. However, a closer look reveals that the picture is more complicated. Instead of consisting exclusively of a government mandate to report non-financial information, the 2014 EU Directive combines elements of both mandatory and voluntary reporting, representing an interesting mix of public and private actor involvement that seems characteristic of evolving reporting trends for non-financial information.

9 EU Directive 2014/95/EU
Although such Directive may result in greater disclosure, it may not be as successful in achieving the goal of improved transparency as its proponents have suggested. Such conclusion is based on an examination of the experiences of Member States that used a government regulatory approach to non-financial reporting prior to adoption of such Directive. This is due at least in part to the fact that the added element of government regulation embodied in the Directive may be a necessary but insufficient condition for achieving improved reporting. Other conditions that are needed to achieve the goal of the Directive to improve non-financial reporting may be missing in some Member States. Another reason is that the EU Directive itself may be considered flawed due to the lack of a firm set of standards for such reporting to be used by all Member States.

Neveretheless, the 2014 EU Directive is an interesting development because of the signal it sends to the marketplace on the importance of non-financial reporting to corporate stakeholders and the lack of effectiveness of prior voluntary approaches alone in fostering such disclosure. It also illustrates that the process of achieving greater transparency by business on social and environmental issues is evolutionary in nature and will take more time to accomplish.

As such, the European Union experience in this area may provide useful instruction for other countries seeking to achieve similar goals with respect to such reporting. Lessons from the European Union experience may be of particular interest to observers in the United States, where the state of corporate social responsibility reporting is poor compared to that in other countries.

The analysis will proceed as follows. Section II will provide some background on the meaning of corporate social responsibility and the traditionally voluntary nature of corporate social responsibility initiatives. It will explain the rationale for use of non-financial reporting as
a means to move business in the direction of greater social responsibility. It will also discuss corporate non-financial disclosure trends in general terms, including the emergence of the GRI Guidelines as the most likely convergence point for a set of standards for non-financial reporting.

Section III will discuss the 2014 EU Directive and its implementation by Member States. Section IV will critique the 2014 EU Directive and the trend it represents for non-financial reporting. It will also speculate about the reasons for the development of the 2014 EU Directive in its current form and address the possibility that its implementation by the Member States will improve non-financial reporting. It will also address the possibility that failure of the 2014 EU Directive to embrace an international reporting standard such as the GRI Guidelines represents a missed opportunity to foster not just more reporting but better reporting. Section V will generalize about the conditions that are needed to achieve greater corporate transparency through non-financial reporting and how the lessons learned from the European experience may be instructive for other countries with a low level of and poor record on non-financial reporting, such as the United States. Section VI will conclude and suggest further areas for research on non-financial reporting.